Supreme Court, U.S.
FILED

96 829 NOV 2 1 1996

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No. 96-___

In The

Supreme Court of the United States

October Term, 1996

JERRY CARR WHITEHEAD,

Intervenor-Petitioner.

Petition For A Writ Of Mandamus Or Prohibition Or, In The Alternative, A Writ Of Certiorari To The Supreme Court Of The State Of Nevada

MOTION FOR LEAVE TO INTERVENE AS PETITIONER AND PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION OR, IN THE ALTERNATIVE, A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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MOTION FOR LEAVE TO INTERVENE OF JERRY CARR WHITEHEAD

Jerry Carr Whitehead, as an individual, moves for leave to intervene as a petitioner and to file a petition for writ of mandamus or prohibition or, in the alternative, a writ of certiorari to the Supreme Court of the State of Nevada. The petition challenges a July 12, 1996 Mandamus Order signed by two justices who were disqualified from the *Whitehead* proceedings.[1] That order resulted in the nullification of judgments and remedies which Judge Whitehead obtained in the *Whitehead* case.[2]

1. Prior to his retirement from the bench, Judge Whitehead was a party/petitioner in original proceedings before the Nevada Supreme Court ("the *Whitehead* case").

2. As a litigant in the *Whitehead* case, Judge Whitehead sought a determination from the Nevada Supreme Court that the disclosure of information concerning an investigation of complaints against him violated the Fourteenth Amendment to the United States Constitution and provisions of the Nevada Constitution and resultant rules governing judicial discipline procedures. As relief, Judge Whitehead requested the court, either directly or through a third party, to conduct an inquiry into the source of the leaks. App. C, App. 31; App. D, App. 34; App. E, App. 57-58. The relief requested by Judge Whitehead was granted by the supreme court. Steffen Petitioners'

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[1] There is pending before this Court a related petition filed by the Honorable Thomas L. Steffen, Chief Justice of the Nevada Supreme Court and Charles E. Springer, Associated Justice of the Nevada Supreme Court ("the Steffen petition"). The docket number for that petition is No. 96-541. This motion to intervene in order to file a petition for writ of mandamus or prohibition or, alternatively, a petition for writ of certiorari is filed in order to protect intervenor's interest in the determinations rendered in the *Whitehead* case and to assert intervenor's independent entitlement to relief from this Court.

[2] Intervenor has retired from the bench. Because most of the events at issue occurred when he was a judge, this brief will refer to intervenor as "Judge Whitehead."

App. C, 85a; App. D, 85a[3]. A special investigator was appointed. His investigation suggested that the leaks may involve two members of the Nevada Supreme Court. Steffen Petitioners' App. E, 106a.

3. Following the appointment of the special master, Ms. Del Papa filed a petition for a writ of prohibition in the supreme court. She named as respondents the three justices of the court who had signed the opinion and order granting the relief requested by Judge Whitehead. Judge Whitehead was excluded from the *Del Papa* proceedings which culminated in the state Mandamus Order challenged here. That Mandamus Order nullifies relief obtained by Judge Whitehead in the *Whitehead* case. The exclusion of Judge Whitehead from the *Del Papa* proceedings resulted in his inability to seek review of the Mandamus Order as a party. Accordingly, in order to protect his individual, constitutionally protected interest in the relief he obtained in the *Whitehead* case, Judge Whitehead seeks to intervene here and seeks leave to file a petition for writ of mandamus or prohibition or, alternatively, a petition for writ of certiorari.

4. Where the "interests of justice" so require, this Court clearly has authority to permit a party to intervene in the first instance in this Court. R. Stern, E. Gressman, S. Shapiro and K. Geller, *Supreme Court Practice* at 315-316 (7th ed., 1993); Fed. R. Civ. P. 24, *cf.* Fed R. Civ. P. 21. *See, e.g., Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978); *Eastern-Central Motor Carriers Assoc. v. United States,* 321 U.S. 194, 198 (1944); *United States v. Terminal Railroad Assoc.,* 236 U.S. 194, 196 (1915). There is a compelling justification for intervention in this case. In response to the Steffen petition, respondents have opposed review, in part, by challenging the standing of those petitioners. Del Papa opposition pp. 15-19; Respondent Justices' opposition pp. 11-12.[4]

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[3] References to "the Steffen petitioners' appendix," as well as to the "respondent justices' appendix" are to appendices filed in the Steffen petition proceedings, Docket No. 96-541.

[4] References to the "Del Papa opposition" and the "Respondent justices' opposition" are to oppositions to the Steffen petition filed in Docket No. 96-541.

The respondent justices have also sought to avoid review of their actions by asserting mootness. They claim that "Judge Whitehead has resigned and gone on with his life . . . ". Respondent Justices' opposition page 16. The retirement of Judge Whitehead is a direct result of the leaks from the commission, and the resultant devastation of his professional reputation and family's peace of mind. Judge Whitehead's entitlement to retain and enforce the remedies he obtained in the *Whitehead* case has been and will continue to be impacted substantially by the Mandamus Order. The commission has not dismissed the complaints against Judge Whitehead, and under Nevada law, the retirement of a judge does not divest the commission of jurisdiction. *See Goldman v. Nevada Comm'n on Judicial Discipline*, 787 P.2d 30, 40-45 (1990).

In *Mullaney v. Anderson*, 342 U.S. 415, 416-17 (1952), this Court granted a motion to add three new party plaintiffs to a case pending before the Court where the defendant had challenged, for the first time, the standing of the original plaintiffs. Relying on the joinder provisions in Rule 21 of the Federal Rules on Civil Procedure, the Court permitted intervention "remove the matter [*i.e.*, the standing issue] from controversy" after finding that the addition "can in no wise embarrass the defendant" and would avoid "the needless waste" that would result from dismissing the case on the standing issue.[5]

In the present case, Judge Whitehead was excluded from the *Del Papa* proceedings. He could not seek appellate review of the Mandamus Order. Should the Court determine that petitioners do not have standing, and deny movant's request to intervene, then the Mandamus Order will be allowed to stand, and the remedies Judge Whitehead obtained in the *Whitehead* case will be nullified. The injury to Judge Whitehead is obvious. Accordingly, the Court should grant this motion to intervene.

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[5] By seeking to intervene in order to assert his independent, personal interest and to "remove this matter from controversy", Judge Whitehead does not intend to cast any doubt upon the validity of the Steffen petitioners' standing.

Judge Whitehead clearly meets the requirements of the three-part test for intervention of right in the federal courts.[6] *See Donaldson v. United States*, 400 U.S. 517, 528-529 (1971); see also 7C C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure* § 1908 at 262 (1986). First, he has a "significantly protected interest" in the subject matter of the litigation. *Donaldson, supra,* 400 U.S. at 531. In this case, two disqualified justices entered an order nullifying relief granted Judge Whitehead in protracted litigation before a lawful tribunal, and forbidding the Clerk of the Nevada Supreme Court from filing any documents in the *Whitehead* case. Thus, he has been denied his right to remedies obtained, his right to seek enforcement of those remedies, and his right of access to a lawful and appropriate tribunal.

Judge Whitehead also meets the second requirement for intervention: the outcome of the Steffen petition may impair or impede his expressed interest. See Wright, Miller and Kane, *supra* at 262, 305- 312. As noted, Judge Whitehead has a strong interest in his entitlement to a qualified tribunal and in the integrity of its judgments entered in his favor. As a "practical" matter",[7] this is Judge Whitehead's only opportunity to seek review of the Mandamus Order. Judge Whitehead's due process rights to a fair tribunal and the protection of confidentiality guaranteed under the Nevada Constitution and procedural rules will be destroyed if review is not

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[6] The same test is applicable while a case is pending in the district court and following entry of judgment. *See; United Airlines v. McDonald,* 432 U.S. 385, 387 and 395 n. 16 (1977). If the Court concludes that movant does not meet the requirements for intervention of right, he respectfully requests this Court exercise its discretion to grant permissive intervention. *See; State of Arizona v. State of California,* 460 U.S. 605 (1983)(Federal Rules of Civil Procedure serve as guide for permissive intervention in original proceedings before this Court); Fed. R. Civ. P. 24(b).

[7] *Natural Resources Defense Council v. Costle;* 561 F.2d 904, 909 (D.C. Cir. 1977) (courts should look to "practical consequences" of denying intervention in determining whether outcome of litigation may impair or impede intervenor's interest).

afforded by this Court and the Mandamus Order is permitted to stand.

Under the final element of the three-part test, Judge Whitehead should be allowed to intervene because he meets the "minimal" burden of showing that "representation of [his] interest *may be inadequate*." *See Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972) (emphasis added). If this Court concludes the Steffen petitioners lack standing, then their representation of Judge Whitehead's interests clearly will be inadequate.

5. The final consideration is whether the motion to intervene is "timely". See Fed. R. Civ. P. 24(a). In determining whether intervention is appropriate, the passage of time is but one factor to be considered; the most important consideration is whether delay has prejudiced the other parties. Wright, Miller and Kane, *supra*, at 435; see also *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1073 (5th Cir. 1970). Respondents, who fashioned the *Del Papa* proceedings to exclude Judge Whitehead, cannot claim any legitimate prejudice from his presence here. It is clear that Judge Whitehead could file a brief as *amicus curiae* in support of the Steffen petition and if he did so, respondents would be required to file an answering brief. Judge Whitehead merely seeks an opportunity to present his individual position to this Court, to petition this Court on his own behalf for relief, and to assure that this Court has a clear Article III basis for rendering a decision on this substantial issue.

Respectfully submitted,

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JERRY CARR WHITEHEAD,

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Petition For A Writ Of Mandamus Or Prohibition Or, In The Alternative, A Writ Of Certiorari To The Supreme Court Of The State Of Nevada

PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION OR, IN THE ALTERNATIVE, FOR A WRIT OF CERTIORARI

QUESTION PRESENTED

A Mandamus Order nullified relief sought and obtained from the Nevada Supreme Court in an original proceeding in which intervenor-petitioner was the petitioner. The Mandamus Order was entered without notice to intervenor. Two of the justices who signed the Mandamus Order are recused from the proceeding in which intervenor-petitioner has obtained relief. The other signing justice had dissented from the relief obtained by intervenor-petitioner. The question presented is:

Whether the due process rights of a civil litigant are violated when two disqualified justices sign an order nullifying the relief obtained from a lawfully empaneled tribunal.

PARTIES TO THE PROCEEDING AND RELIEF SOUGHT

Contemporaneously with the filing of this brief, intervenor-petitioner Jerry Carr Whitehead has filed a motion for leave to intervene and to file a petition for writ of mandamus or prohibition or, in the alternative, for a writ of certiorari. Judge Whitehead was a party to the proceedings in the court whose judgment is sought to be reviewed, however, he was not a party to the proceedings which culminated in the entry of the Mandamus Order. The parties to those proceedings were; the Honorable Thomas L. Steffen, Chief Justice of the Nevada Supreme Court, Charles E. Springer, Associate Justice of the Nevada Supreme Court, the Honorable David Zenoff, Senior Justice of the Nevada Supreme Court and Frankie Sue Del Papa, the Attorney General of the State of Nevada.

Intervenor-Petitioner seeks a writ of prohibition or mandamus directed to the Honorable C. Clifton Young, and Robert E. Rose, Associate Justices of the Nevada Supreme Court, both of whom are disqualified from the proceedings below, vacating an order entered July 12, 1996 issued by those justices and directing them to refrain from taking any further action in the proceedings below.

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OPINIONS BELOW

The Mandamus Order by two disqualified justices of the Nevada Supreme Court (Steffen petitioners' App. A 1a)* is reported at 920 P.2d 489. That order, in part, reaffirms an earlier unreported administrative order dated September 15, 1995 (Steffen petitioners' App. B 7a) and an opinion dated April 25, 1996 (Steffen petitioners' App. F 110a) reported at 915 P.2d 245. The decisions of the Nevada Supreme Court vacated in whole or in part by the Mandamus Order of the disqualified justices (Steffen petitioners' App. C 9a; App. E 92a) are reported at 878 P.2d 912 and 908 P.2d 219. The Mandamus Order also vacates an opinion (Steffen petitioners' App. G 133a) reported at 920 P.2d 491.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1651 (a) or, in the alternative, 28 U.S.C. § 1257. The Mandamus Order that is the subject of this Petition was issued July 12, 1996.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state

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* References to "the Steffen petitioners' " appendix the "respondent justices' " appendix and the "Del Papa" appendix are to appendices filed in the related Steffen petition proceedings, Docket No. 96-541.

deprive any person of life, liberty, or property, without due process of law. . . .

U.S. Const., amend XIV.

STATEMENT

Judge Whitehead has a due process right to the preservation and enforcement of relief he obtained in the *Whitehead* case, a substantially adjudicated proceeding before a lawfully constituted tribunal. That relief was later nullified in proceedings brought by the Attorney General of the State of Nevada, who had been unsuccessful opposing counsel in the *Whitehead* case. On July 22, 1993 while he was a state judge in Nevada, Judge Whitehead initiated prohibition and mandamus proceedings in the Nevada Supreme Court challenging conduct of the Nevada Judicial Discipline Commission. Because the Nevada Constitution and applicable rules governing judicial discipline investigation required confidentiality of all proceedings at the initial stage, Judge Whitehead sought and, on July 30, 1993 obtained, an order from the Nevada Supreme Court directing that the proceedings before it be sealed. App. E, App. 49.[9]

Justice Young disqualified himself from the *Whitehead* case at its inception because he was a member of the judicial discipline commission during the period of time the events challenged by Judge Whitehead occurred.[10]

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[9] That order was signed by respondent Justice Rose prior to his disqualification from the *Whitehead* case.

[10] Following his recusal, Justice Young manifested his support of the commission by accompanying the commission members when the Whitehead file was produced for the court's *in camera* review and by

Beginning on October 10, 1993 articles began to appear in a Nevada newspaper which contained selected information which was subject to the confidentiality provisions of the state constitution, the applicable procedural rules and the supreme court's order. App. F, App. 49-53.

In response to those articles, Judge Whitehead filed a motion for order to show cause, investigation and protective order.[11] App. C, App. 31.

Judge Whitehead also filed an emergency motion for permission to make a public statement concerning the proceedings. In granting that motion, four members of the Court, including Justices Shearing and Rose, who later signed the challenged Mandamus Order, signed an order stating "we note that this issue is before us due in part to serious breaches of confidentiality by "unnamed sources" in apparent violation of both the Nevada Constitution and the rules of this court. We also note that petitioner has borne the brunt of the press accounts of the proceedings against him. . . . Confidentiality of judicial discipline proceedings exists for the benefit of the accused judge." App. B.

Respondent Justice Rose later recused himself from the *Whitehead* case after Judge Whitehead filed a motion to disqualify him. Petitioners' App. G 162a-63a n.12. Justice Rose initially resisted Judge Whitehead's motion to disqualify him, relying upon the premise that "a judge has 'a duty to

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sitting with the commission members during the oral argument on the *Whitehead* case. Petitioners' App. G. 163a n. 12.

[11] The motion sought, in part, to determine the source of the leaks in order to protect Judge Whitehead's rights to due process and privacy. App. C App. 33-34.

preside . . . in the absence of some statute, rule of court, ethical standard, or other compelling reason to the contrary' ". Respondent justices' App. A 2a. In his reply to the motion to disqualify him, Justice Rose revealed, for the first time, that he had been interviewed by the police in early 1993 concerning his conversation with the district attorney. Justice Rose further revealed that he learned the police had sought criminal charges against him at the end of October or the beginning of November 1993, and that he also learned that the matter had been referred to Ms. Del Papa in early November. Respondent justices' App. A 10-11a.

In reply to Justice Rose, Judge Whitehead noted both Justice Rose and Ms. Del Papa had failed to disclose the pending investigation. Judge Whitehead further noted that statements made by Justice Rose following the filing of the motion to disqualify him in the *Whitehead* case had provided additional grounds for his disqualification. Justice Rose indicated his prejudgment of the issues in *the Whitehead* case. Respondent justices' App. A 12a. Additionally in statements to the press, Justice Rose charged that the disclosure of his conversation with the district attorney was "prompted" by his strong statement in the Whitehead case and was part of "an orchestrated effort" to remove him from the Whitehead case and "soften him up" for his upcoming re-election. App. A, App. 16. Justice Rose told the press "I have been told to get off the case or things would be made tougher for me. . . . Whitehead's lawyers, I'm told, have access to all these wiretaps." App. A, App. 17.

Judge Whitehead argued these statements demonstrated Justice Rose's involvement in *ex parte* conversations concerning the *Whitehead* case. App. A, App. 17. Judge Whitehead and each of his counsel signed affidavits under penalty of

perjury stating they had no access to the information which Justice Rose claimed they had leaked, and had no conversations with the press in which they had provided information concerning the criminal investigation of Justice Rose. App. A, App. 19-28.

Following the filing of that reply, on January 14, 1994 Justice Rose announced in a press release his "voluntary" disqualification in the *Whitehead* case. Respondent justices' App. B. Senior Justice Zenoff was appointed to fill the Rose vacancy.

On December 9, 1993 Judge Whitehead filed a Motion for Protection of Petitioner's Due Process Rights. That motion was specifically premised upon the Fourteenth Amendment to the United States Constitution. App. E, App. 48. Judge Whitehead argued that if the source of the leaks was a member of the commission, or if a member of the commission had knowledge of the source of the leaks and did not act to protect confidentiality, he was entitled to assert that fact as a basis to challenge the participation of that member as an adjudicator in proceedings against him. Accordingly, he requested the Court to either directly or through a third party determine whether any member of the commission was responsible for the leaks. App. E, App. 58.[12] That request was

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[12] Under Nevada's rules governing judicial discipline proceedings:

> Any member of the commission . . . may be disqualified upon challenge for cause by the respondent [judge]. . . . A challenge must be heard by the commission and the commission may disqualify any commissioner who by reason of actual or implied bias would, in the opinion of a majority of the members present, either be prevented from adjudicating the matter in a fair or impartial manner, or by reason of facts

premised specifically upon Judge Whitehead's expressed entitlement to the protection afforded by the Fourteenth Amendment to the United States Constitution of his liberty and property interests. App. E, App. 60-61.

In seeking an investigation under the supervision of the Nevada Supreme Court to determine the source of the leaks, Judge Whitehead argued "neither the Commission nor this Court may ignore Petitioner's federally protected entitlement to the enforcement of his state-based rights to disciplinary proceedings conducted without contrived interference of improper leaks." App. E, App. 61. Ultimately the Nevada Supreme Court agreed. On July 26, 1994, the Court granted Judge Whitehead's requests for an investigation into the source of the leaks. Steffen Petitioners' App. C. By that order, the Court provided that "[a] special master shall hereafter be appointed by the court and shall be specially empowered by further and special order of this court to conduct such investigations as shall be necessary to determine the sources of the unlawful breaches of confidentiality that have occurred in these proceedings *and the extent to which they may have impacted Petitioner's due process rights.*" Steffen petitioners' App. C 28a (emphasis added).

In her dissent to that order, Justice Shearing stated that "recent events lead to the strong inference that the breach of confidentiality occurred within this court. This court should check its own personnel and procedures before casting aspersions on others." Following that statement, Justice Shearing

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creating an appearance of impropriety, be prevented from adjudicating the matter in a manner consistent with maintenance of public confidence in the commission. A.R.J.D. 3.6. App. E, App. 56.

determined she would "defer decision on the appointment of a special master." Steffen petitioners' App. C. 83-84a.

Consistent with the July 26, 1994 order granting the relief requested by Judge Whitehead, the court appointed a special master on September 1, 1995. Steffen petitioners' App. D. Pursuant to that appointment, a deposition was taken on September 2, 1995. The deponent was Ms. Pat Lundvall, a Reno lawyer who had been employed by a firm whose members had animosity, not toward Judge Whitehead, but towards certain present and former members of the Nevada Supreme Court. Steffen petitioners' App. H. 198a-205a. Following receipt of a copy of Judge Whitehead's request for appointment of a special master to determine the source of the leaks, Ms. Lundvall informed her partner that she hoped that "whatever he had done" he had done from the Las Vegas rather than the Reno office of the firm, because she did not want to have to "deal with a subpoena". Within days, Ms. Lundvall received instruction that the firm had a new policy and that all phone records were to be shredded that day. Steffen petitioners' App. H. 212-213a. Ms. Lundvall did not destroy the records. Upon leaving the firm, she put them in a safe deposit box and produced them to the special master. Steffen petitioners' App. H. 213-217a.

Ms. Lundvall further testified that in mid-October, 1993 – the same time period that the leaks were being published and Judge Whitehead had first sought an investigation into their source – the partner met alone with respondent Justice Rose on a Saturday in the Reno office of the firm. Steffen petitioners' App. H. 241-243a.

Thirteen days after the deposition of Ms. Lundvall, disqualified Justices Rose and Young and dissenting Justice

Shearing entered an order voiding the order entered by the court in the *Whitehead* case appointing the special master. That order was entered on the court's administrative docket. Steffen petitioners' App. B 7a. On December 15, 1995, the *Whitehead* court entered an order holding that disqualified justices could not, in the context of an administrative docket proceeding and without notice to Judge Whitehead of their intent to do so "set aside a previous judgment of this court granting a motion filed by petitioner Whitehead." Steffen petitioners' App. E 93a.

Thereafter, on December 21, 1995, Ms. Del Papa filed an original writ petition with the Nevada Supreme Court naming justices Steffen, Springer and Zenoff as respondents. The petition sought the nullification of the appointment of the special master which had been the relief requested by and granted to Judge Whitehead. Steffen petitioners' App. G 139a.

Judge Whitehead was not a party to the *Del Papa* proceeding.

On April 25, 1996, apparently without affording the respondents to the Del Papa petition an opportunity to respond, Ms. Del Papa was granted relief and a writ of mandamus was entered forbidding the special master from proceeding with the investigation ordered by the *Whitehead* court. Steffen petitioners' App. F 110a, 117a ("We find it unnecessary to ask for a response or further authority from Respondents in regard to this petition because we are aware of their position on the relevant issues as stated in their opinions in the Whitehead case and in the administrative petitions concerning that case").

On July 5, 1996 the *Whitehead* court filed an opinion declaring void the writ issued in the *Del Papa* proceedings, in part on the basis that the participation of two justices who were disqualified from the *Whitehead* case violated Judge Whitehead's due process rights. Steffen petitioners' App. G 155-163a. In response, the disqualified justices entered an order in the *Del Papa* proceedings striking the July 5, 1996 opinion in the *Whitehead* case and directing the Clerk of the Nevada Supreme Court "to accept no filings in [either the *Whitehead* case or the *Del Papa* proceedings] unless approved by a majority of the elected members of the court." Petitioners' App. A 5a.

REASONS FOR GRANTING THE PETITION

Attorney General Del Papa had represented the respondent Nevada Commission on Judicial Discipline in the *Whitehead* case. In that case, Ms. Del Papa was unable to persuade the Nevada Supreme Court that: 1) the Nevada Constitution did not mandate confidentiality of judicial discipline proceedings at the initial stage, 2) Judge Whitehead did not have a due process right to confidentiality of proceedings against him, 3) a special master should not be appointed to determine the source of the leaks and the effect of the leaks upon Judge Whitehead's due process rights.

Judge Whitehead obtained judgments and orders from the lawfully empaneled court which granted him relief on each of those issues.

Thereafter, Ms. Del Papa filed a petition challenging the determinations which had been decided adversely in the *Whitehead* case. The respondents to the petition were the

three justices who had granted the relief sought by Judge Whitehead.[13] The Del Papa petition was decided by three justices of the Nevada Supreme Court, two of whom were disqualified from the *Whitehead* case.

Two members of the tribunal who deprived Judge Whitehead of the remedies he had sought and received in proceedings before a competent tribunal are powerless under the due process clause to effect the outcome of the *Whitehead* case. *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813 (1986).[14] This Court is the only forum in which Judge Whitehead can seek the restoration of what has been taken from him in violation of the Fourteenth Amendment's Due Process Clause. Sup. Ct. R.20; App. A 5a (Mandamus Order directs the Clerk of the Nevada Supreme Court to refuse all further filings in the *Whitehead* case). *See; Kerr v. United States District Court for the Northern District of California,* 426 U.S. 394, 403 (1976) (when petitioner has no other remedy, mandamus may be appropriate).

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[13] The relief had been granted by a four to one majority which included District Judge A. Guy, who has since retired from the bench because of ill health.

[14] Concerning the disqualification of the respondent justices and the violation of the Fourteenth Amendment which culminated in the entry of the disputed Mandamus Order, Judge Whitehead adopts the arguments contained in the petition of Chief Justice Steffen and Justice Springer in the petition filed in this Court in Docket No. 96-541.

I. THE MANDAMUS ORDER VIOLATES JUDGE WHITEHEAD'S RIGHTS TO DUE PROCESS

Judge Whitehead was guaranteed confidentiality in proceedings before the Nevada Commission on Judicial Discipline under the Constitution of the State of Nevada, and the resultant administrative and procedural rules. Nev. Const., art 6 § 21(5), Administrative and Procedural Rules for the Nevada Commission on Judicial Discipline, Rules 1, 5 and 6.

Judge Whitehead requested a determination from a lawful tribunal that his state constitutional and procedural rights had been violated by selective leaks of judicial discipline proceedings against him. The tribunal determined the leaks violated state law. Judge Whitehead is entitled to employ that determination in his defense against pending proceedings before the judicial discipline commission.

The Fourteenth Amendment to the United States Constitution extends certain procedural safeguards to property interests "that stem from an independent source such as state law." *Leis v. Flynt,* 439 U.S. 438, 441 (1979); *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972).

As a judge, Judge Whitehead had protected liberty and property interests in his judgeship. Nevada Constitution Art. 6 § 5; *See; Green v. McElroy,* 360 U.S. 474, 492 (1959) (liberty interest includes right to hold specific employment); *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985) (the constitutionally enforceable property rights of a state employee are created and defined under state law).

Under state law, Judge Whitehead could only be denied his judgeship by impeachment under Article 7 of the Nevada Constitution or removal by the commission under Article 6

§ 21. Under that Article, the Nevada Supreme Court was empowered to make rules governing the proceedings of the commission, including constitutionally mandated confidentiality of those proceedings. In response to a request from Judge Whitehead, the Nevada Supreme Court, including two justices who later signed the challenged Mandamus Order, held that "[c]onfidentiality of judicial discipline proceedings exists for the benefit of the accused judge". App. B App. 29. Thus, Judge Whitehead had a legitimate claim of entitlement to the confidentiality of proceedings before the judicial discipline commission, the denial of which violates due process. *Compare Board of Regents v. Roth,* 408 U.S. 564, 577 (1972) (due process protects denial of legitimate benefit conferred by state law).

Because Judge Whitehead had a state-recognized right to confidentiality, the Mandamus Order which abolished both that right and the remedy needed to enforce that right violates his Fourteenth Amendment right to due process. *Compare; Leis v. Flynt, supra,* 443 (Fourteenth Amendment does not require state court to accord procedural due process when no cognizable property interest stems from state law).

Judge Whitehead's due process right to access to the courts has been defeated by the disqualified justices. In addition to nullifying relief he obtained, the Mandamus Order directed the clerk of the court to refuse any filings in the *Whitehead* case. It did so without affording Judge Whitehead an opportunity to be heard, in violation of due process. *Logan v. Zimmerman Brush Co.,* 455 U.S. 420, 429 (1982) (due process clause protects civil litigants who seek recourse in the courts and prohibits states from denying potential litigants use of established adjudicatory procedures).

II. THE MANDAMUS ORDER ABOLISHES RELIEF OBTAINED BY JUDGE WHITEHEAD

Since the issuance of the judgments in the *Whitehead* case, and prior to the filing and determination of the Del Papa petition, Judge Whitehead retired and no longer serves in a judicial capacity.[15] That event does not render the issues in this petition moot. *See; Powell v. McCormack*, 395 U.S. 486, 497 (1969) ("Where one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy").

Under Nevada law, the Commission on Judicial Discipline is not divested of jurisdiction to proceed upon complaints upon the retirement of a judge. *See; Goldman v. Nevada Comm'n on Judicial Discipline*, 787 P.2d 30, 40-45 (1990); *citing In re Peoples*, 250 S.E. 2d 890 (1978). The

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[15] Respondents have each noted to this Court that Judge Whitehead "resigned in order to avoid further investigation" by the United States government. Del Papa opposition page 8 n.2, respondent justices' opposition, page 5. Judge Whitehead is aware of the potential impact of those statements and can do little within the confines of this proceeding to explain them. He does, however, respectfully draw this Court's attention to the testimony of Pat Lundvall that the partners of her former firm had, to further their interest in reactivating an investigation into the Nevada Supreme Court, intentionally ingratiated themselves with Walt Stowe, the acting head of the F.B.I. in Nevada. The partners had entertained Agent Stowe at their home. They also directed Ms. Lundvall to "be extra nice" to Mrs. Stowe, take her to lunch and later have her husband "comp them [Agent Stowe and his wife] to breakfast at our restaurant, and to make sure they had a good time." Petitioners' App. H. Pp 258-261a. Counsel of Record for Judge Whitehead was co-counsel in the matters which led up to the letter which respondent Del Papa included as Appendix G. That letter was a direct response to a meeting between her co-counsel, herself, the special prosecutor and Agent Stowe.

determinations of the Court in the *Del Papa* proceeding nullified Judge Whitehead's successful assertion of his entitlement to the protection by Nevada Supreme Court of his due process rights. App. E App. 48. The Mandamus Order will substantially reduce Judge Whitehead's ability to challenge any action the Commission might take in the future in the pending proceedings against him.

The proceedings before the Nevada Commission on Judicial Discipline have not been dismissed. The Mandamus Order prohibiting the filing of further documents and nullifying the remedies obtained by Judge Whitehead divests him of remedies to which he would otherwise be entitled in the event that the Nevada Commission on Judicial Discipline chooses to go forward on the pending complaints.

Additionally, Judge Whitehead's entitlement as an aggrieved person to seek redress for the violation of confidentiality which he was assured under the Nevada Constitution remains following his retirement from the bench. Nev. Const., art 6 § 21(5), Administrative and Procedural Rules for the Nevada Commission on Judicial Discipline Rule 6. Any suggestion that Judge Whitehead has an adequate remedy under state tort law for the harm he suffered as a result of the leaks would be cynical and unreasonable.

Judge Whitehead pursued his case in the Nevada Supreme Court because of a genuine concern for the independence of the judiciary and the integrity of the state processes under which judges are subject to discipline.[16] The relief he

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[16] In his request to make a public statement, Judge Whitehead relied upon the First Report of the Study Committee on the Nevada Judicial Discipline Commission, which noted a tradition of politically motivated

obtained as a result of that pursuit is uniquely appropriate to remedy the violations of state law. The revocation of that relief by a rogue tribunal cannot be tolerated under the Fourteenth Amendment to the United States Constitution. *Compare; Logan v. Zimmerman, supra* with *Parrat v. Taylor,* 451 U.S. 527 (1981).

CONCLUSION

This case presents an ominous example of the ramifications of an unbridled usurpation of legitimate judicial authority. The petition for a writ of mandamus or prohibition should be granted. While it is hoped that the egregious denial of due process which culminated in the Mandamus Order is not commonplace in the nationwide system of justice, this Court is the sole available forum in which this matter can be addressed. Judge Whitehead's denial of his federally protected property and liberty interests can only be remedied by this Court. If it is not, this Court's prior recognition that the Fourteenth Amendment to the United States Constitution does not "permit a court's decision to stand when a disqualified

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abuses of power, including selective leaks which unjustifiably damaged the reputations of other judicial officers. Throughout the course of the proceedings, Judge Whitehead provided other instances of misconduct by the Commission, to which the Nevada Supreme Court referred in its opinions. *Whitehead v. Nevada Commission on Judicial Discipline,* 873 P.2d 946, 968-971 (1994); *Whitehead v. Nevada Commission on Judicial Discipline,* 893 P.2d 866, 904-909 (1994).

judge casts the deciding vote" will be undermined. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 827-828 (1986).

Respectfully submitted,

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November 21, 1996

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE PETITION FOR A WRIT OF PROHIBITION OR IN THE ALTERNATIVE FOR A WRIT OF MANDAMUS. Case No. 24598

_____/

REPLY IN SUPPORT OF MOTION TO DISQUALIFY CHIEF JUSTICE

(Filed Jan. 04, 1994)

COMES NOW the Petitioner, by and through his undersigned counsel, and pursuant to the Order of the Vice Chief Justice authorizing Petitioner to file a Reply in support of his motion to disqualify the Chief Justice, Robert E. Rose, in the above-entitled proceeding, submits the following response to the Opposition filed by the Attorney General and the Opposition Response filed by the Chief Justice.

The issue presented by the Petitioner's motion was whether events and circumstances in an unrelated matter, the Rhonda Mushkin drug prosecution in Clark County, had created a situation where there was an apparent temptation to an average man, as judge, not to hold the "balance nice and clear and true" between the parties to this proceeding, thereby creating an appearance of impropriety if Chief Justice Rose continued to participate in this case. This is an objective test, and the authorities cited and quoted by the Petitioner clearly demonstrate that the involvement of the Chief Justice in the Mushkin matter, and the resultant potential criminal liability of the Chief

Justice, did in fact create a disqualifying appearance of impropriety.

The responses of both the Attorney General and the Chief Justice have ignored this issue, and have raised more questions than they have answered by relying upon (1) alleged procedural deficiencies arising from the concealment of the facts of the investigation from this Court and counsel for the Petitioner; (2) self-serving protestations of subjectively characterized justified motives and proper purposes; (3) inapposite comparisons with conduct not found to be disqualifying in other cases; and (4) false and unsupported attacks against Petitioner's counsel in the media as well as in pleadings filed in this action. These responses, particularly the response of Chief Justice Rose, have raised a second issue, which is whether the Chief Justice has manifested actual bias against Petitioner and his counsel arising from an extrajudicial source, and prejudice in the nature of prejudgment of the actual issues presented in this proceeding.

ARGUMENT ON THE ISSUES

A. THE POTENTIAL CRIMINAL LIABILITY ARISING FROM THE CHIEF JUSTICE'S INVOLVEMENT IN THE MUSHKIN DRUG PROSECUTION REQUIRES THAT HE BE DISQUALIFIED IN THE INSTANT CASE.

The responses of the Attorney General and the Chief Justice to the Petitioner's motion cannot obfuscate, obscure, or alter the obvious fact that the Chief Justice, on behalf of a former law clerk, engaged in conduct in which

the power and influence of his office as Chief Justice appears to have been used to affect the exercise of prosecutorial discretion by the Clark County District Attorney who is a frequent litigant in this Court. Nor can such responses erase or minimize the fact that the ***ex parte*** conversation with counsel for the State was both preceded and followed by ***ex parte*** conversations with the defendant, Mushkin, and with Rusty LaFrance, a friend of Mushkin and a bartender employed by the Chief Justice, in which the Chief Justice discussed both the merits of procedures in the case as well as his effort to intercede with the District Attorney. Despite the insistence of the Chief Justice that his motives were pure and he was only telling the District Attorney to "do his job", the potential for criminal liability for the acts which have been reported in the media and essentially admitted by the Chief Justice is apparent.[1] A Metro (LVMPD) Detective reportedly requested a warrant for obstruction, and the Clark County District Attorney's office, which was itself involved in the questionable conversation and therefore not objective, completely ignored the conversation between the District Attorney and Chief Justice Rose, and only considered charges arising from the revelation of the fact of the wiretap and the fact of the investigation to Mushkin. The District Attorney determined not to bring

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[1] The parallels between the allegations made against former United States District Judge Harry Claiborne in his relationship with Joseph Conforte, and against former United States district Judge Alcee Hastings, and those arising from the Mushkin matter are obvious. Although both judges were acquitted of the charges arising from such allegations, they were both also permanently removed from office.

such charges, not because the conduct wasn't criminal, but rather because Mushkin already knew about the wiretap and investigation, and therefore the deputy district attorney did not believe they could prove them beyond a reasonable doubt. This determination was thereafter rubber-stamped by the Attorney General's Office, who, according to its response herein, ***conducted no investigation at all.*** (Opposition to Motion to Disqualify, p. 4)

It is not up to the Petitioner, his counsel, or even this Court to decide whether Chief Justice Rose has any actual criminal liability arising from the Mushkin matter; however, it is entirely up to the discretion of the Attorney General to determine whether he should even be prosecuted, so that a grand jury can determine whether to charge him, and a court can determine whether the charges can be sustained. It is that unreviewable discretion which creates the appearance of impropriety herein, particularly since the Attorney General rushed to exonerate the Chief Justice after having the case for less than a week, and with no investigation at all. Apparently the Attorney General's office, like the Clark County District Attorney's Office, did not even consider the implications of the conversation between the Clark County District Attorney and the Chief Justice, and never reviewed any of the tapes or other evidence which led a Las Vegas detective to believe a warrant should be issued.

Jeopardy has not attached to the Chief Justice, and the Attorney General can change her mind at any time as to whether a prosecution should be instituted, or a grand jury investigation requested. This Court cannot rely on the assertions of the Chief Justice or the Attorney General

that he has been exonerated; the Petitioner and his counsel have no knowledge as to the nature of the evidence except as reported in the media; it is therefore submitted that this Court should conduct a review of the evidence, including all tape recordings containing the voice of, or references to, the Chief Justice, to determine for itself whether there is a potential for prosecution. If there is such a potential on an objective review, then the Chief Justice remains in jeopardy and completely subject to the unreviewable discretion of the Attorney General, which would make the appearance of impropriety arising from his participation in any case in which the Attorney General has an interest, either as lawyer or litigant, unavoidable. It is worthy of note that in the case of ***In the Interest of McFall,*** 617 A.2d 707, 713-714 (Pa. 1992), the judge there involved was never actually prosecuted, but nonetheless was disqualified from all criminal matters in her court.

1. Alleged Procedural Deficiencies Do Not Preclude Consideration Of This Motion.

The Opposition filed by the Attorney General to Petitioner's Motion claims that the motion should not be considered because the supporting Affidavit was not based on the personal knowledge of Petitioner's counsel, and because the affidavit did not charge "fraud or illegal conduct" subsequent to decisions made on contested matters in this case.

The appearance of impropriety in this case was caused by the media reports of the acts which placed Chief Justice Rose in jeopardy of criminal prosecution,

and the motion is based on such appearance of impropriety, with personal knowledge of the news reports which were attached to the motion. Petitioner's counsel attempted to determine if the reported facts were true, and made direct inquiry of Chief Justice Rose in advance of filing the motion. Further, in accordance with N.R.A.P. Rule 35, the motion was served on the Attorney General in advance of being filed with the Clerk. Neither the Attorney General nor the Chief Justice advised Petitioner's counsel of any factual inaccuracies, although the Chief Justice did engage in media interviews in which he essentially confirmed the reported facts.

The facts alleged in the motion, as reported by the media, have essentially been verified by the pleadings of the Attorney General and the Chief Justice, with a few additions and/or corrections, such as the fact that the Attorney General chose to exonerate the Chief Justice with no investigation after having the file for less than a week. The Chief Justice clearly had a duty to reveal to the Court and Petitioner's counsel the fact of the pending investigation as soon as he knew about it. See Canon 3(E), Commentary, which provides:

> "A judge ***should disclose on the record*** information that the judge believes the parties or their lawyers might reasonably consider relevant to the question of disqualification, ***even if the judge believes there is no real basis for disqualification.***" (Emphasis added)

Any reasonable party or lawyer would certainly believe that the fact that the Chief Justice of the tribunal deciding the case was under criminal investigation by the attorney for one of the parties, who happens to be the

chief law enforcement officer of the state, would be relevant to the question of disqualification. It is clear on the record herein that neither the Chief Justice nor the Attorney General made such disclosure in this case, even after the media reports and the service of the Petitioner's motion before it was filed. The "investigation" or consideration of criminal prosecution of the Chief Justice by the Attorney General was not disclosed on the record of this case until the Opposition of the Attorney General was filed. The failure to disclose a material fact which a person has a duty to disclose is fraud, (*Sanguinetti v. Strecker,* 94 Nev. 200, 577 P.2d 404 (1978) and it is therefore submitted that fraud is shown by such non-disclosure, if, under the circumstances of this case, it is even necessary to demonstrate fraud.

It is respectfully submitted that this motion should be decided on its merits, as the public perception of the honesty and integrity of the judiciary is at stake, and the concealment of material information by the Chief Justice and the Attorney General should not be rewarded by insulation from accountability for the matters concealed.

2. Self-Serving Protestations of Justified Motives and Proper Purposes Should Not Preclude Consideration of Whether an Appearance of Impropriety Has Been Created.

The second reason proffered by the Chief Justice in opposition to the Motion to Disqualify is that he did nothing wrong in the Mushkin matter, echoing his statement reported extensively in the media that he was merely telling the Clark County District Attorney to "do

his job". Again, this Court and the Petitioner are hampered by not having access to the material which the media apparently has, i.e., the actual conversations in which the Chief Justice talked to the District Attorney or the defendant. However, the issue here is not the secret motives of the Chief Justice, but rather whether his conduct has created a potential for criminal liability which leaves him at the mercy of the Attorney General.

The normal way a Supreme Court Justice tells a prosecutor to "do his job" is in the form of a signature to a written order or decision in an actual case or controversy before the Court. One wonders if the Chief Justice has had other occasions to travel to Las Vegas to personally admonish the prosecutor of Clark County to "do his job", particularly in cases which involve complete strangers to him. Nonetheless, whatever his unexpressed purposes or motives may have been at the time he engaged in such conversations, the fact remains that the impropriety of his conversations regarding the Mushkin case, which were surreptitiously recorded and preserved, cannot be denied. That impropriety unquestionably compromises his position in this case, where the conduct of the Attorney General, acting as counsel to the Respondent, defines the very issues presented to this Court for decision. The unrestricted and unreviewable discretion reposed in the Attorney General to determine whether the Chief Justice should be required to account for such impropriety in a criminal forum creates precisely the type of temptation not to hold the balance nice, clear, and true, which Due Process of law prohibits regardless of the actual mental state of the judge. (***In re Murchison***, 349 U.S. 133, 136

(1955); *Aetna Life Insurance v. Lavoie*, 475 U.S. 813 (1986); *In the Interest of McFall, supra*)

3. The Authorities Cited by Chief Justice Rose and the Attorney General are Inapposite.

Like the proverbial comparison of apples and oranges, the Chief Justice in his response relies heavily upon *Ainsworth v. Combined Insurance*, 105 Nev. 237, 744 P.2d 1003 (1989); *Goldman v. Bryan*, 104 Nev. 644, 764 P.2d 1296 (1988) and *In re Petition of Dunleavy*, 104 Nev. 784, 769 P.2d 1271 (1988) to claim that since the tribunals were not disqualified in those cases, he should not be disqualified in the instant case. The problem with such analysis is that the cases relied upon do not deal with the issue of an appearance of impropriety arising from an interest in the outcome of a proceeding. They deal with claims of actual bias manifested in statements, orders, rules, or court proceedings. As such, they implicate well-established rules such as the requirement that bias arise from an extrajudicial source (*Goldman v. Bryan, supra; Ainsworth v. Combined Insurance, supra*), that merely accepting campaign contributions does not create bias (*Dunleavy, supra*), and that opinions developed subsequent to a ruling in the case do not demonstrate bias retroactively (*Ainsworth supra*). The well-established rule in the situation, such as that presented herein, where an interest which creates a temptation not to hold the balance nice, clear and true creates an appearance of impropriety for which Due Process requires disqualification is not implicated in any of the cases discussed by the

Chief Justice or Attorney General, and is not discussed at all in their respective oppositions to the motion.

The Chief Justice spends a great deal of effort in discussing the ***Ainsworth*** case in which the losing party made an attempt to disqualify a former Chief Justice after losing the case. Curiously, the claims made by the losing party which the Attorney General characterizes in her Opposition as "conclusory and speculative allegations" (Opposition, p. 6, lls. 13-14), Chief Justice Rose characterizes as "facts". (Response of Chief Justice, p. 4, l. 26). In truth, a review of the Court's Opinion demonstrates that the Attorney General's characterization is far more accurate. The laundry list of "facts" in ***Ainsworth,*** as set forth by Chief Justice Rose in his Response, were, for the most part, found not to be "facts" by the Court. The first "fact" relied on by the Chief Justice is the allegation that the former chief justice openly ridiculed the losing attorney and called him "loser" or "losing lawyer" 130 times in a response to a motion to disqualify. The Court's opinion found that such claims were untrue as to the oral argument, and that the characterization of the attorney as the "loser" was subsequent to the rendition of the decision in the case.

The second "fact" relied on by the Chief Justice herein is the claim that the former chief justice made statements at oral argument indicating a clear animus towards the insurance industry in general. The Court's Opinion indicates that this characterization was rejected, and that the comments and questions of the former chief justice were representative of "his usual well-known aggressive use of the Socratic method", with disapproval of counsel being based solely on a judicial source, i.e., the

matters in the record. The third "fact" stated by the Chief Justice herein, i.e., the reliance on extrajudicial material, was rejected by the Court, since none of such material was known or considered prior to the rendition of the decision in the case. The alleged "preconceived negative impression" of counsel, set forth as the fourth "fact" by the Chief Justice herein, was likewise rejected by the Court as such negativity came solely from judicial sources and was not grounds for disqualification. The fifth "fact" relating to prior representation of the Justice by one of the counsel for the parties was rejected by the Court as non-disqualifying, and the sixth "fact", that one of the attorneys who filed an ***amicus*** brief had previously represented the Justice was likewise found to be non-disqualifying, especially since she did not represent a party to the action. The comment that this same attorney, Laura Wightman FitzSimmons, represents Petitioner in this case, is superfluous, obviously irrelevant, and included for media consumption only, since no one is seeking to disqualify Petitioner in this case. The conclusion that the Chief Justice seeks to have this Court draw is that the "facts" outlined regarding the former chief justice were not disqualifying in ***Ainsworth,*** so therefore he should not be disqualified in this case either. unfortunately, the conclusion does not follow from the premise, since the ***Ainsworth*** case does not involve the same grounds for disqualification, and the applicable principles herein are different.[2] The principles governing the

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[2] Unfortunately, the willingness of the Chief Justice in his Response to follow the lead of the Attorney General and her associates, manifested repeatedly throughout this case, of accusing and verbally assassinating everyone who disagrees,

situation of a disqualifying interest are set forth in detail in the motion to disqualify, and have been neither discussed nor distinguished by the opponents of the motion. It is respectfully submitted, in accordance with the arguments and case authority cited in the points and authorities submitted in support of such motion, that the vulnerability of the Chief Justice to the discretion of the Attorney General creates an appearance of an interest in the outcome of this proceeding which mandates his disqualification in accordance with well-established principles of Due Process of Law.

B. MEDIA STATEMENTS AND STATEMENTS IN PLEADINGS BY THE CHIEF JUSTICE DEMONSTRATE ACTUAL BIAS AND PREJUDICE WHICH ARE THEMSELVES DISQUALIFYING.

Although the initial issue raised by the Petitioner's Motion to Disqualify Chief Justice was limited to the appearance of impropriety created by the role of the Chief Justice in the unrelated Mushkin drug case, and the effect of the Attorney General's prosecutorial discretion arising from that situation, statements made by the Chief Justice in his Response to the motion, as well as subsequent media commentary attributed to the Chief Justice have created a second issue. It now appears that the Chief Justice entertains actual bias and prejudice against the

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has now created the same issue of actual bias and prejudice that was raised in the ***Ainsworth, Goldman and Dunleavy*** cases, although the application of the same principles which were determinative therein leads to a different result herein. See Argument B, ***infra***.

Petitioner and his counsel, arising from extrajudicial sources and not from the exercise of any judicial functions in this case or any other case.

The files and records in this proceeding, and the incessant media coverage which began in mid-October of 1993, demonstrate that the Attorney General and her associates have resorted to vicious assassination of the Petitioner, his counsel, and members of this Court at every opportunity in order to avoid the real issues presented by the Petitioner's challenge herein to the Respondent's jurisdiction, and the manner in which it has exercised its authority. The Answer to the Petition filed by the Attorney General on behalf of the Respondent is nothing more than a vicious attack on the character and integrity of the Petitioner, and in various subsequent motions, the Attorney General has attacked this Court, defying its Order for Production by claiming that it is attacking the constitutional authority of the Commission, and apparently disobeying the order for confidentiality by leaking selected materials and quotas attributed to "unnamed sources" which parrot the positions taken by the Attorney General in this case. Attacks on Petitioner's counsel have been relentless, even to the point of making ridiculous assertions that it has been Petitioner and his counsel who have been the source of leaks to the news media criticizing the Court for its rulings in Petitioner's favor.

It now appears that the Chief Justice has abandoned his role as the presiding judge of the tribunal charged with deciding this case, and has joined the Attorney General in attacking the Petitioner and his counsel. In doing so, the Chief Justice has falsely accused Petitioner

and/or his counsel with threats against him, and with leaking the contents of transcripts of tape recordings to the media, attributing his information to unnamed extra-judicial sources. The Chief Justice has also accused counsel of "rambo-style" litigation practices and "win at all costs" tactics, although to the knowledge of Petitioner and his counsel, they have completely followed all applicable rules and orders of this Court, and have not retaliated against the Respondent and Attorney General's violation and defiance of orders and rules by engaging in similar conduct themselves.[3]

Paragraph 7 of the Chief Justice's sworn affidavit is particularly troubling. It states:

> "7. One of the attorneys for Judge Whitehead suggests in the motion to disqualify that the Mushkin matter and my participation in the Whitehead case is causing a serious crisis of

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[3] A non-issue raised in the Attorney General's Opposition is a continuation of the same sort of attack against members of this Court, in violation of the confidentiality provisions of the Administrative Rules governing the Judicial Commission (ARJD Rule 5). The Attorney General makes reference to complaints allegedly filed against two other Justices of this Court with the Commission, and argues that if the Chief Justice is disqualified such other Justices should be disqualified as well. The media reports of such complaints indicate that they are based on rulings made in this case, and thus would not be within the jurisdiction of the Commission. (ARJD Rule 9) Presumably they have been dismissed on that basis and are no longer still pending. If they are still pending for any reason, the Attorney General has violated ARJD Rule 5 by making reference to them, since there has been no probable cause determination.

> public confidence in the integrity and independence of our judicial system. This allegation is too foolish for words. I would suggest, though, that the attorneys for Judge Whitehead are truly creating such a crisis by their 'rambo-style' litigation practices, their "win at all costs" tactics, and their absolute refusal to recognize the legitimate authority of the Nevada Commission on Judicial Discipline given it by the Nevada Constitution and the people of Nevada. The integrity of the Nevada Commission on Judicial Discipline must be protected and its role in judicial discipline respected."

This paragraph is troubling not only because it does not identify the litigation practices and tactics of which the Chief Justice is complaining, but because it manifests on its face that the Chief Justice has prejudged the precise issues which are presented in this proceeding, without yet having seen or considered the evidence which the Court ordered produced, and which the Respondent has refused to produce. Neither Petitioner nor any of his counsel have ever objected to the exercise of legitimate authority by the Nevada Commission on Judicial Discipline, nor have Petitioner or his counsel ever suggested that the legitimate exercise of the Commission's role in judicial discipline should be curtailed. The issues presented in this case relate to whether the Commission is legitimately acting within the scope of its jurisdiction, and whether it is abusing its role in judicial discipline by an unconstitutional inquisition unrestrained by the rules which govern its proceedings or fundamental principles of due process. It appears from the Chief Justice's statement that he has prejudged these issues and is condemning the Petitioner and his counsel for daring to invoke the

legitimate jurisdiction of this Court to require the Commission to act in accordance with its legitimate jurisdiction.

An even more malignant manifestation of bias against Petitioner and his counsel surfaced recently when someone made some of the transcripts of the Chief Justice's recorded conversations in the Mushkin case available to the Nevada Appeal. The Chief Justice promptly accused Petitioner and his counsel, although such accusations are completely false, unfounded and unsupported. Attached hereto are newspaper articles which have reported quotes attributed to Chief Justice Rose, some of which are:

> "He [the Chief Justice] called the release of the confidential material part of 'an orchestrated effort' by foes who want him removed from a case involving Washoe Judge Jerry Carr Whitehead and to 'soften me up for my re-election next year.'
>
> " 'These leaks are no coincidence.' Rose said.
>
> * * *
>
> "The attorney general's office represents the Commission on Judicial Discipline which has been asked to investigate complaints that Whitehead should be disciplined. Rose decided earlier this month to continue to participate in the Whitehead case.
>
> "He [the Chief Justice] said Wednesday that his strong statement on that matter prompted the disclosure of wiretap information.

> " 'I have been told to get off the case or things would be made tougher for me.' Rose said. 'Whitehead's attorneys, I'm told, have access to all these wiretaps.'

Each of the Petitioner's attorneys has executed an affidavit attesting that he or she has never had access to the tapes or transcripts and never discussed the contents of the taps or transcripts with any representative of the media. The identity of the persons who "told" the Chief Justice that Petitioner's attorneys had access to the tapes or transcripts is not disclosed, but it would necessarily have to be an extrajudicial source, since nothing in the files and records of this or any other case indicates that the Chief Justice could have been given such false information in the context of any judicial proceeding. The same is true of the comment that the disclosure of the contents of some of the tapes was part of an "orchestrated effort" to have him removed from the case. It appears that the willingness of the Chief Justice to engage in *ex parte* conversations extends to this case as well as the Mushkin case. If he has been accurately quoted, he has obviously violated Canon 3(A)(7) which prohibits a judge from receiving or considering communications outside the presence of the parties or their counsel in formulating his accusations against Petitioner and his counsel.

Unlike the *Ainsworth, Goldman* and *Dunleavy* cases discussed *infra,* the manifestations of actual bias and prejudice contained in the Chief Justice's Response and in quoted material attributed to him by the news media were neither created nor emanated from the exercise of any judicial functions. In *Papa v. New Haven Federation of Teachers,* 444 A.2d 196 (Conn. 1982), the Court held that a

judge's statements to a newspaper concerning pending proceedings not only was a clear violation of the Code of Judicial Conduct[4], but raised reasonable questions as to the judge's ability to remain fair and impartial, making the denial of a motion for recusal error.

It is respectfully submitted that the Chief Justice has revealed actual bias and prejudice as to the issues raised in this case, as well as to the Petitioner and his counsel whom he wrongly and falsely blames for personally embarrassing disclosures, all of which emanates from extrajudicial sources. He should therefore be disqualified for this reason as well as for the appearance of impropriety raised initially in the Motion to Disqualify Chief Justice. Due process requires not only actual justice, but the appearance of justice. In view of the position in which the Chief Justice is in because of his conduct in the Mushkin case, and in view of the positions he has taken regarding the issues in this case, and regarding Petitioner and his counsel, in both his pleading in this case as well as in the public media, the appearance of justice in this case cannot possibly be retrieved while Chief Justice Rose continues to participate as a part of the tribunal.

WHEREFORE, Petitioner prays that the Motion to Disqualify Chief Justice be granted.

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[4] The applicable provisions of the Connecticut Code of Judicial Conduct considered in the ***Papa*** case are identical to Canon 3(a)(9) and Canon (3)(C)(1) of the Nevada Code of Judicial Conduct.

Dated: January 3, 1994

Respectfully submitted,

DOMINIC GENTILE, ESQ.
GENTILE & PORTER
LAURA WIGHTMAN FITZSIMMONS
JOHN OHLSON
OHLSON & SPRINGGATE
HAMILTON & LYNCH

By /s/ Vivian E. Lynch
VIVIAN E. LYNCH
Attorneys for Petitioner

AFFIDAVIT

STATE OF NEVADA)
) ss:
COUNTY OF WASHOE)

VIVIAN E. LYNCH, being first duly sworn, does solemnly swear, under penalty of perjury, as follows:

1. That I am one of the attorneys for the Petitioner in the above-entitled action; that I have personal knowledge of the facts herein stated except as to those matters stated upon information and belief, which I believe to be true; and that I am competent to testify as a witness thereto if called upon to do so.

2. That I have never seen nor had any access to transcripts, or tapes, of any conversations, on the telephone or otherwise, that were intercepted in the Mushkin

investigation, including any tapes which concerned Chief Justice Rose.

3. That the only knowledge I had concerning the Mushkin investigation prior to, and at the time, of the filing of the Motion to Disqualify Chief Justice was the news media reports as set forth in the affidavit previously filed herein.

4. That at no time have I had access to the transcript or tape recording of a conversation between the chief Justice and the Clark County District Attorney, Rex Bell concerning the prosecution in the Mushkin case.

5. That I have not had any communication, directly or indirectly, with any person affiliated with the news media wherein I disclosed any information concerning recorded conversations relevant to the Mushkin investigation, including any conversations with or concerning Chief Justice Rose.

6. After reading newspaper reports which disclosed that Chief Justice Rose was under criminal investigation by the Attorney General, I personally participated in the preparation of a letter to the Chief Justice requesting that he recuse himself from this case. The letter was neither harsh nor accusatory, but was prepared and delivered in an attempt to avoid public embarrassment to the Chief Justice which would be likely if a formal motion to disqualify were filed. It was only after Chief Justice Rose declined to recuse himself that my obligation to my client compelled me and co-counsel to protect his rights by the filing of a formal motion.

7. To my knowledge, I have not engaged in any conduct in the course of my representation of Judge Whitehead with the intent to cause public embarrassment of the Chief Justice, and until I read recent reports in which the Chief Justice unfairly, inaccurately and falsely made accusations against my client, myself and my co-counsel, I have actively supported the Chief Justice, and believed that our relationship was cordial.

/s/ Vivian E. Lynch
VIVIAN E. LYNCH

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 3RD DAY OF JANUARY, 1994 BY
VIVIAN E. LYNCH

/s/ Debra A. Christensen
NOTARY PUBLIC

[NOTARY SEAL]

AFFIDAVIT

STATE OF NEVADA)
: ss:
COUNTY OF WASHOE)

JERRY CARR WHITEHEAD, being first duly sworn, does solemnly swear, under penalty of perjury, as follows:

1. That I am the Petitioner in the above-entitled action; that I have personal knowledge of the facts herein

stated except as to those matters stated upon information and belief, which I believe to be true; and that I am competent to testify as a witness thereto if called upon to do so.

2. That I have never seen nor had any access to transcripts, or tapes, of any conversations, on the telephone or otherwise, that were intercepted in the Mushkin investigation, including any tapes which concerned Chief Justice Rose.

3. That at no time have I had access to the transcript or tape recording of a conversation between the Chief Justice and the Clark County District Attorney, Rex Bell concerning the prosecution in the Mushkin case.

4. That I was not the source directly or indirectly to the news media of the information published concerning recorded conversations relevant to the Mushkin investigation, including any conversations with or concerning Chief Justice Rose.

/s/ Jerry Carr Whitehead
JERRY CARR WHITEHEAD

Subscribed and sworn to before me
this 3 day of January, 1994 by
Jerry Carr Whitehead.

/s/ Betty Jo Vonderheide
Notary Public

[NOTARY SEAL]

AFFIDAVIT

STATE OF NEVADA)
) ss:
COUNTY OF WASHOE)

JOHN OHLSON, being first duly sworn, does solemnly swear, under penalty of perjury, as follows:

1. That I am one of the attorneys for the Petitioner in the above-entitled action; that I have personal knowledge of the facts herein stated except as to those matters stated upon information and belief, which I believe to be true; and that I am competent to testify as a witness thereto if called upon to do so.

2. That I have never seen nor had any access to transcripts, or tapes, of any conversations, on the telephone or otherwise, that were intercepted in the Mushkin investigation, including any tapes which concerned Chief Justice Rose.

3. That the only knowledge I had concerning the Mushkin investigation prior to, and at the time, of the filing of the Motion to Disqualify Chief Justice was the news media reports.

4. That at no time have I had access to the transcript or tape recording of a conversation between the chief Justice and the Clark County District Attorney, Rex Bell concerning the prosecution in the Mushkin case.

5. That I have not had any communication, directly or indirectly, with any person affiliated with the news media wherein I disclosed any information concerning

recorded conversations relevant to the Mushkin investigation, including any conversations with or concerning Chief Justice Rose.

6. After reading newspaper reports which disclosed that Chief Justice Rose was under criminal investigation by the Attorney General, I personally participated in the preparation of a letter to the Chief Justice requesting that he recuse himself from this case. The letter was neither harsh nor accusatory, but was prepared and delivered in an attempt to avoid public embarrassment to the Chief Justice which would be likely if a formal motion to disqualify were filed. It was only after Chief Justice Rose declined to recuse himself that my obligation to my client compelled me and co-counsel to protect his rights by the filing of a formal motion.

/s/ John Ohlson
JOHN OHLSON

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 3RD DAY OF JANUARY, 1994 BY
JOHN OHLSON

/s/ Vivian E. Lynch
NOTARY PUBLIC

[NOTARY SEAL]

AFFIDAVIT OF LAURA WIGHTMAN FITZSIMMONS

Laura Wightman FitzSimmons, being first duly sworn, deposes and states under penalty of perjury as follows:

1. I am licensed to practice law in this State and represent Judge Jerry Carr Whitehead in matters before this court and before the Nevada Commission on Judicial Discipline.

2. I have never seen or had any access to transcripts, or tapes, of any phone conversations that were intercepted in the Mushkin investigation, including any tapes which concerned Chief Justice Rose.

3. Long before I undertook representation of Judge Whitehead, in the first part of 1993, I heard rumors in the legal community that politically embarrassing conversations involving Chief Justice Rose had been intercepted in the course of the Mushkin investigation. I disclosed those rumors to Chief Justice Rose during a judicial selection meeting in Las Vegas which occurred in June of 1993, well before I learned of any complaints for judicial discipline against Judge Whitehead.

4. I had no knowledge, until I read John Ralston's column, that the Chief Justice was under criminal investigation by LVMPD, or thereafter by the Attorney General. Nor did I have knowledge of the specific nature of the conversations.

5. I have never seen or had any access to the transcript, or tape, of a conversation between Rex Bell and Chief Justice Rose concerning the prosecution of the Mushkins.

6. I have not had any communication, directly or indirectly, with any member of the press in which I disclosed information on recorded conversations with or concerning Chief Justice Rose and anyone else relevant to the Mushkin investigation or prosecution.

7. After reading newspaper reports which disclosed that Justice Rose was under criminal investigation by the attorney general, I personally delivered to Justice Rose, and the other Justices of the Court, a letter requesting the Chief Justice to recuse himself from this case. I did so in an attempt to avoid the public embarrassment to Chief Justice Rose which would follow the filing of a formal recusal motion. It was only after Chief Justice Rose declined to recuse himself that we were compelled to assert the rights of our client and file a formal, public recusal motion. I have not done any act in the course of my representation of Judge Whitehead, or otherwise, with the intent to cause public embarrassment of the Chief Justice Rose. Indeed, until I read the recent reports in which the Chief Justice unfairly and inaccurately characterized my client, my co-counsel, and myself, I have actively supported the Chief Justice, and believed that our relationship was quite cordial.

/s/ Laura Wightman Fitzsimmons
LAURA WIGHTMAN
FITZSIMMONS

SUBSCRIBED and SWORN to before me
this 30th day of December, 1993.

/s/ Adele L. Johansen
NOTARY PUBLIC

[NOTARY SEAL]

AFFIDAVIT OF DOMINIC GENTILE

Dominic Gentile, being first duly sworn, deposes and states under penalty of perjury as follows:

1. I am licensed to practice law in this State and represent Judge Jerry Carr Whitehead in matters before this court and before the Nevada Commission on Judicial Discipline.

2. I have never seen or had any access to transcripts, or tapes, of any phone conversations that were intercepted in the Mushkin investigation, including any tapes which concerned Chief Justice Rose.

3. I have never seen or had any access to the transcript, or tape, or a conversation between Rex Bell and Chief Justice Rose concerning the prosecution of the Mushkins.

4. I have not had any communication, directly or indirectly, with any member of the press in which I disclosed information on recorded conversations with or

concerning Chief Justice Rose and anyone else relevant to the Mushkin investigation or prosecution.

/s/ Dominic Gentile
DOMINIC GENTILE, ESQ.

SUBSCRIBED and SWORN to before me
this 30th day of December, 1993.

/s/ Adele L. Johansen
NOTARY PUBLIC

[NOTARY SEAL]

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE PETITION FOR A WRIT OF PROHIBITION OR IN THE ALTERNATIVE A WRIT OF MANDAMUS. No. 24598

_____/

CONFIDENTIAL ORDER

(Filed Nov. 03, 1993)

Petitioner has moved for permission to make a public statement regarding these proceedings. The motion is based on the intense publicity this matter has received as a result of information given the Las Vegas Review-Journal by certain "unnamed sources." Petitioner feels compelled, in light of the news accounts generated from "unnamed sources," to defend himself and his reputation by issuing a public statement. The Commission on Judicial Discipline does not oppose the request.

Preliminarily, we note that this issue is before us due in part to serious breaches of confidentiality by "unnamed sources" in apparent violation of both the Nevada Constitution and the rules of this court. We also note that petitioner has borne the brunt of the press accounts of the proceedings against him, and that our rules governing the Judicial Discipline Commission do not specifically address petitioner's rights in this situation.

Confidentiality of judicial discipline proceedings exists for the benefit of the accused judge. Rules 5(4),

5(5), 5(7) and 7 permit the accused judge to waive the confidentiality of the proceedings.

Assuming, but not deciding, that petitioner needs this court's approval to issue a public statement, we grant petitioner's motion for permission to make a public statement on the understanding that such a statement will waive the petitioner's right of confidentiality of the proceedings before this court, and thereby will cause this court's records of the proceedings to be made public.

It is so ORDERED.

/s/ Rose, C.J.
Rose

/s/ Steffen, J.
Steffen

/s/ Springer, J.
Springer

/s/ Shearing, J.
Shearing

cc: Hon. Frankie Sue Del Papa, Attorney General
Brooke Nielsen, Deputy Attorney General
Guy Shipler, Chairman, Judicial Discipline Commission
Ohlson & Springgate
Hamilton & Lynch
Gentile, Porter & Kelesis
Laura Wightman FitzSimmons

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE PETITION FOR A WRIT OF PROHIBITION OR IN THE ALTERNATIVE FOR A WRIT OF MANDAMUS	)	No. 24598

MOTION FOR ORDER TO SHOW CAUSE, INVESTIGATION, AND PROTECTIVE ORDER

Comes Now the Petitioner, through counsel Vivian Lynch, John Ohlson, Dominic Gentile and Laura FitzSimmons, and hereby moves this Court for:

1) an investigation to determine the source of the attached news article which appeared on the front page of the Sunday edition of the Las Vegas Review Journal/ Sun on October 10, 1993;

2) the issuance, to that source, of an order to show cause concerning the contemptuous, unethical and illegal dissemination of confidential matters which is evident from the attached article; and

3) a protective order requiring the Nevada Commission on Judicial Discipline and anyone purporting to act on its behalf to ensure that confidentiality is maintained in all proceedings concerning Petitioner by submissions under seal in all forums, including proceedings which the Commission may be contemplating initiating in the United States District Court for the District of Nevada.

This motion is based upon the record in this action and § II.6 of the Administrative and Procedural Rules for the Nevada Commission on Judicial Discipline.

Dated this 11th day of October, 1993.

/s/ Dominic P. Gentile
DOMINIC P. GENTILE
Gentile & Porter
302 E. Carson Ave., Fourth Fl.
Las Vegas, NV 89101
(702) 386-0066

/s/ Laura Fitzsimmons
LAURA WIGHTMAN FITZSIMMONS
302 E. Carson Ave., suite 622
Las Vegas, NV 89101
(702) 388-9111

/s/ Vivian Lynch
VIVIAN LYNCH
Hamilton & Lynch
321 S. Arlington Ave
Reno, Nevada 89501
(702) 786-5585

/s/ John Ohlson
JOHN OHLSON
Ohlson & Springgate
522 Lander Street
Reno, Nevada 89509
(702) 323-0300

CERTIFICATE OF SERVICE

I hereby certify that I am employed by Laura Wightman FitzSimmons and that on the 11th day of October, 1993, I mailed a true and correct copy of the foregoing Motion, marked "Confidential" and postage prepaid at Las Vegas, Nevada, addressed as follows:

DON CAMPBELL
Campbell & Associates
300 S. Fourth Street #1409
Las Vegas, NV 89101

HONORABLE FRANKIE SUE DEL PAPA
Attorney General
Heroes Memorial Building
Capitol Complex
Carson City, NV 89710

BROOKE NIELSEN
Chief Deputy Attorney General
Heroes Memorial Building
Capitol Complex
Carson City, NV 89710

_____
Heather Brown

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE PETITION FOR A WRIT OF PROHIBITION OR IN THE ALTERNATIVE FOR A WRIT OF MANDAMUS	)))))	No. 24598

RESPONSE TO OPPOSITION TO MOTION FOR ORDER TO SHOW CAUSE

(Filed Apr 22, 1994)

Comes Now the Petitioner, through counsel Vivian Lynch, John Ohlson, Dominic Gentile and Laura FitzSimmons, and hereby responds to the opposition to motion for an investigation of the person(s) who breached their obligation of confidentiality as set forth in the attached Points and Authorities.

Dated this 20th day of October, 1993.

/s/ Laura Wightman Fitzsimmons

LAURA WIGHTMAN FITZSIMMONS
302 E. Carson Ave., suite 622
Las Vegas, NV 89101
(702) 388-9111

DOMINIC P. GENTILE
Gentile & Porter

VIVIAN LYNCH
Hamilton & Lynch

JOHN OHLSON
Ohlson & Springgate

POINTS AND AUTHORITIES

Background

On October 12, 1993, in response to the first of what was to become a series of news articles, Petitioner filed, through counsel, a request for an investigation by this court to determine the source of the publicity, and upon identification of that source, the issuance of an order to show cause to address the improper conduct.[1]

Petitioner's motion, consistent with other activity by petitioner and his counsel in this case, was filed in compliance with this Court's order maintaining confidentiality, and the underlying nascent proceedings before the commission on judicial discipline.[2]

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[1] The Commission asserts that the failure of Petitioner to file an affidavit giving rise to the circumstances of the contempt renders his motion deficient. Petitioner requested, initially, that the source of the leak be identified. Petitioner so fashioned his request because he was hesitant to seek an order to show cause against individual members of the commission, or its counsel, who may be blameless – and were hopefully equally appalled by the leaks. Unfortunately, it appears from the response that no member of the commission, or any of its counsel, has disavowed or condemned the patent breach of confidentiality that has occurred.

[2] In its opposition the commission claims that its breach of confidentiality is "now surely moot . . . now, not only has the petitioner violated this order, but the Court has violated its own Order as well."

The sole basis of the commission's claim that the Court has violated confidentiality, is the October 14, 1993, letter of its Clerk.

Petitioner has not violated this Court's Order of confidentiality, nor have his counsel. The commission's accusation against Petitioner is irresponsible and without foundation.

Petitioner's motion was leaked to the press. Petitioner's counsel were vilified for "intimidation". The editor of the newspaper that generated the article was interviewed by the reporter to whom the leaks were made. The editor urged the court to "do the right thing, [and] deny that motion."[3]

The commission has determined that Petitioner should face censure or removal from public office because of statements that he made criticizing the use of preemptory challenges in civil cases, and communications and reassignment that resulted from the filing of preemptory

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It is interesting to note that the commission has taken the position that since Petitioner has not advanced his numerous factual and legal defenses to the substance of the proceedings against him, he has conceded their factual basis. Notably, the same position was set forth in the articles which has appeared in the press.

In its response to Petitioner's request for an investigation, the Commission has not once denied that it is responsible for a leak of information to the press. Under the commission's approach to due process, its failure to now deny that it is responsible for the leak is telling.

[3] Judge Brent Adams, described as being "an authority of Nevada civil procedures", was quoted as saying: "The whole concept of a state court telling a party how they must proceed in a federal court is bizarre. I've never heard anything like it in 20 years in the law." (Nevada Appeal article. 10/17/93).

If Judge Adams indeed commented on the motion that was pending before this court, his conduct violated Canon 3 (9) of the Nevada Code of Judicial Conduct, which prohibits a judge, while a proceeding is pending in any court, from making any public comment that might reasonably be expected to effect its outcome. The commentary to that Canon states that such comment is prohibited during any appellate process.

challenges against him in a handful of cases over a six year period.

On the other hand, the Attorney General of this State, and attorneys working under her authority, are apparently unconcerned with the calculated, malicious, repeated leaks that have emanated either from the Nevada commission on judicial discipline or its lawyers. The commission and its lawyers, at least one of whom is responsible for sabotaging this Court, Petitioner, and the public's perception of its judiciary, resists a request for an investigation to determine the identity of the individuals who have breached confidentiality. See: *Landmark Communications, Inc. v. Virginia*, 435 U.S. 830, 839, 98 S.Ct. 1535, 1542 (1978) ("The operation of the Virginia Commission, no less than the operation of the judicial discipline commission itself, is a matter of public interest.")

In response to his request for protection from a breach of the Rules of the commission and the orders of this Court, Respondents charge Petitioner with "arrogance", an "apparent belief that he is above the constitutionally mandated process for procedures", "attack[ing] the Constitution", and "contaminat[ing] these proceedings".

It is clear that the perspective and agenda of the commission and its counsel have clouded its judgment in these proceedings. Petitioner's request for an investigation into the source of the news articles was not calculated to intimidate anyone who was acting in good faith, in compliance with applicable rules. It was not directed against "strangers to this proceeding", such as the press.

The request was made to assert Petitioner's rights to due process and privacy.

Additionally, Petitioner is entitled, under the Rules, to challenge for cause any member or alternate member of the commission for actual or implied bias. Clearly, if one or more members of the commission was the source of the biased articles which appeared with such calculation, that member would be subject to removal for cause. Rules 3.6 and 6 of the Administrative and Procedural Rules for the Nevada commission on judicial discipline.

Respondent has thrust upon this court an essential challenge to its judicial power.

The commission was created by an initiative process that was ratified in the 1976 general election, in tandem with the creation of the commission on judicial selection. Statutes of Nevada 1973, p. 1954 & 1956; Statutes of Nevada 1975 P. 1872.

The commission on judicial selection and the commission on judicial discipline were added to the Nevada Constitution in Article 6, which governs the judicial department.[4]

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[4] Undersigned counsel Laura FitzSimmons is a permanent member of the Commission on Judicial Selection as provided for in Art. 6 § 20 of the Nevada Constitution. Unlike Respondent, the Commission on Judicial Selection is not subject to the specific constitutional requirement that this Court enact rules governing its procedure. Indeed, there being no such requirement, there have been no rules promulgated by this Court which govern the proceedings of judicial selection. Clearly, the right of the public to a fair process which results in the appointment of qualified judges is every bit as important as

Article 6 § 1 states that the judicial power of this state shall be vested in the court system.

The courts possess the entire body of intrinsic judicial power of this state and cannot be controlled by either of the other branches of government. *State ex rel. Watson v. Merialdo,* 70 Nev. 322, 268 P.2d 922 (1954). Judicial power includes activities which involve the regulation of those matters that can logically and legitimately be derived from the judicial power. *Galloway v. Truesdell,* 83 Nev. 13, 422 P.2d 237 (1967).

In the constitutional sense, judicial power is something more than authority to hear and determine, it includes the power to decide and carry its determination into effect. *Bergman v. Kearney,* 241 F. 884 (D. Nev. 1917). NRS 1.210 provides that "every court shall have power . . . to enforce order in the proceedings before it, or before a person or persons empowered to conduct a judicial investigation under its authority."

Respondent commission, however, has once again told this Court that it believes that orders which this

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the right of the public to judges who comply with the Code of Judicial Conduct.

It is inconceivable, however, that the members of the Judicial Selection Commission would deem themselves to be on equal constitutional footing with the members of this Court. Were the Judicial Selection Commission to demonstrably fail to act in good faith, and in violation of its rules, and were the aggrieved party to obtain an order from this Court requiring the selection commission to correct its conduct, any claim that this Court had no authority to supervise the Article 6 commission would be delusional.

Court has issued are not based upon a correct interpretation of the Nevada Constitution and the Rules governing its proceedings which were recently adopted by this Court after extensive consideration. Respondent commission refuses to recognize that it is the role of this court, and not the commission[5], to interpret the state constitution and the rules that it has enacted. Art. 6 § 1 of the Nevada Constitution, *Boyer v. Taack*, 107 Nev. 625, 817 P.2d 1176 (1991) (Court free to interpret NRCP 68 as it deems appropriate); *Galloway v. Truesdell*, 83 Nev. 13, 422 P.2d 237 (1967) (Courts exercise judicial powers, including interpretation of Constitution.)

Respondent's belief that this Court's orders are invalid does not justify its defiance.

Respondent asserts that:

■ "This Court has no basis or authority to conduct an investigation in an attempt to chill the First Amendment . . . in determining the validity of the Court's Order requiring secrecy in the Writ of Prohibition proceeding, the first issue that must be resolved is whether the Order would withstand First Amendment scrutiny. *See Landmark Communications v. Virginia*, 435 U.S. 829, 98 S. Ct. 1535 (1978)."

Petitioner joins with Respondent in directing this Court's attention to *Landmark*. There, a Virginia court convicted a newspaper of a criminal offense for a breach of confidentiality of proceedings before a Virginia Judicial

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[5] The commission is comprised of two district court judges, two attorneys at law, and three lay persons. It is advised by the Attorney General, a member of the executive branch.

Inquiry and Review Commission. The newspaper appealed the conviction on First Amendment grounds to the United States Supreme Court which noted that:

> The narrow and limited question, then, is whether the First Amendment permits the criminal punishment of third persons who are strangers to the inquiry, including news media, for divulging or publishing truthful information regarding confidential proceedings of the Judicial Inquiry and Review Commission.
>
> **We are not here concerned with the possible applicability of the statute to one who secures the information by illegal means and thereafter divulges it. We do not have before us any constitutional challenge to a State's power to keep the Commission's proceedings confidential or to punish participants for breach of this mandate. (Fn 10) At least two categories of "participants" come to mind: Commission members and staff, employees, and witnesses or putative witnesses . . . No issue as to either of these categories is presented in this case.** 98 S.Ct at 1540-1541.

In *Landmark*, the United States Supreme Court noted that 47 states had established judicial discipline mechanisms, and each one (except Puerto Rico) required confidentiality of the proceedings prior to the filing of a formal complaint. id at 1539. In footnote 9 of the opinion, the Court indicated that had the lower court limited the sanction of criminal conviction for violation of confidentiality to participants, it might well save the statute from constitutional invalidity.

In any event, the Court concluded its opinion by stating that the risk of injury to the reputation of the judge under inquiry could be diminished by "careful internal procedures to protect the confidentiality of commission proceedings" **including contempt.** id at 1545.[6]

■ Respondents further ratify their breach of confidentiality by challenging the Order that was entered by three Justices of this Court:

> "It is evident that the Court is bootstrapping the judicial commission's constitutional mandates and rules regarding confidentiality of its investigations onto the writ of prohibition proceeding before this court. Simply stated, judicial commission rules do not give this Court the authority to conduct its proceedings in secret . . . We remind the Court that not only did it lack authority to issue the Order of confidentiality, it also lacks jurisdiction to even consider the petition for writ of prohibition."

As is clear from the numerous articles that Petitioner attached to his Request for Permission to Respond, the breach of confidentiality that has occurred encompasses matters that the commission considered in its "investigation." Even if that were not the case, the argument that writ proceedings which are directed at the commissions

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[6] The *Landmark* opinion so clearly supports Petitioner's assertion of confidentiality in these proceedings, and the appropriateness of sanctions for a breach of that confidentiality by participants, that Respondent's reliance upon the case is disturbing. It is unsettling, at best, to consider that Respondent's contempt for this Court could be manifested in its citation of authority that is directly contrary to its claimed holding.

investigatory practices are not governed by this Court's rules concerning confidentiality is one which is intellectually disingenuous.

To quote from the letter of the Clerk of this Court, attached to the commission's opposition, "In such a case, the Supreme Court of Nevada is compelled by the provisions of Article 6, § 21(5) of the Nevada Constitution, and Rules 5, 6, 7 and 8 of the Administrative and Procedural Rules for the Commission on Judicial Discipline, to maintain the confidentiality of the proceedings."

■ The commission claims that the court has no authority to act because it has not made any interlocutory "orders" as set forth in Rule 40(7).

A review of the Rules in their entirety establishes that no action of the commission, prior to a final determination on the merits of a complaint, is termed an "order". See Rule 29, 30, 31. Clearly, however, the minutes of the commission[7] establish that it has asserted its authority, in many instances in excess of its jurisdiction, in the course of these proceedings. The assertion of that authority culminated in the approval of a "complaint for probable cause" which was thereafter served upon petitioner.

Under these circumstances, this petition for extraordinary relief is entirely appropriate. Rule 40(7); NRAP 21(c); NRS 34.330; NRS 34.160.

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[7] Attached to the Commission's emergency motion for review by entire court of order vacating oral argument, filed September 21, 1993.

■ Respondent requests that if this court proceeds with a contempt hearing the entire court remove themselves.

Initially, in light of Respondent's ratification of the breach of confidentiality which is evident from the content and tenor of its opposition, the offensive conduct has occurred within the immediate view and presence of the court and cannot be characterized as indirect contempt. *See; In Re Mitchell* 102 Nev. 61, 714 P.2d 1007 (1986).

More specifically, the provisions of Rule 6 provide:

> Any person who breaches the confidentiality of judicial disciplinary proceedings is subject to being found guilty of contempt of the supreme court. In addition, members of the commission who are judges are subject to disciplinary proceedings before the commission for violation of this rule, and are also subject to removal as members of the commission upon order of the supreme court. Lawyers are subject to appropriate professional discipline for violation of this rule.

The Rule which this court enacted in satisfaction of the Article 6 § 21.5 mandate clearly empowers the members of this Court to hold any person who has breached confidentiality in contempt. The commission's continued assertion that this Court is powerless to counter its excess is once again without legitimate foundation.

Conclusion

For the second time in these proceedings, the commission has defied the essential judicial power of this court.[8]

This defiance underscores petitioner's request for relief from this court. The commission, which defies this Court and its own rules, has continually demonstrated its destructive capabilities, and the depth of its animosity towards petitioner.

At the same time, Petitioner takes no comfort in the current crisis that faces this Court. He understands that the escalation of this controversy has diminished not only his own reputation and authority, but that of this Court. It could not have been anticipated that the commission, which is represented by the Attorney General, would have chosen such a reckless course.

An appreciation of the gravity of this conflict and its possible ramifications tempers Petitioner's response. He understands that the direct challenge to the supremacy of the Court has emerged is an issue of great and farreaching significance.

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[8] See; letter to this Court dated October 14, 1993, signed by the members of the Commission, in which the Commission informed this court that it was constitutionally demanded to defy this Court's "assault by a series of secret, illegal, and void "orders". To acquiesce in this most recent attempt to emasculate and usurp the separate constitutional powers of the Commission would violate the oath which each of the undersigned has sworn to fulfill."

Independent of the issues which Petitioner has presented in these proceedings, the tension between the authority of this Court, and the usurpation of the Article 6 commission must be settled by this Court in its own considered manner.

Petitioner does respectfully submit, however, that the confrontation between the commission's interpretation of its authority and sovereignty and this Court's constitutional power should be resolved in these proceedings and at this time. If the delineation of respective power and authority is not now established, the ramifications for this, and other, proceedings in judicial discipline are ominous.

Dated this 20th day of October, 1993.

/s/ Laura Wightman Fitzsimmons
LAURA WIGHTMAN FITZSIMMONS
302 E. Carson Ave., suite 622
Las Vegas, NV 89101
(702) 388-9111

DOMINIC P. GENTILE
Gentile & Porter

VIVIAN LYNCH
Hamilton & Lynch

JOHN OHLSON
Ohlson & Springgate

CERTIFICATE OF SERVICE

I hereby certify that I am employed by Laura Wightman FitzSimmons and that on the 20th day of October, 1993, I mailed a true and correct copy of the foregoing Response, marked "Confidential" and postage prepaid at Las Vegas, Nevada, addressed as follows:

DON CAMPBELL
Campbell & Associates
300 S. Fourth Street #1409
Las Vegas, NV 89101

HONORABLE
FRANKIE SUE DEL PAPA
Attorney General
Heroes Memorial Building
Capitol Complex
Carson City, NV 89710

BROOKE NIELSEN
Chief Deputy Attorney General
Heroes Memorial Building
Capitol Complex
Carson City, NV 89710

/s/ Heather Brown
Heather Brown

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE PETITION FOR A WRIT OF PROHIBITION OR IN THE ALTERNATIVE FOR A WRIT OF MANDAMUS	)	No. 24598

MOTION FOR PROTECTION OF PETITIONER'S DUE PROCESS RIGHTS

(Filed Dec. 09, 1993)

Comes Now the Petitioner, through counsel Vivian Lynch, John Ohlson, Dominic Gentile and Laura FitzSimmons, and hereby moves this Court for protection of his rights to due process as set forth in the Rules Governing the Nevada Commission on Judicial Discipline ("the Rules"), the Nevada Constitution, and the Fourteenth Amendment to the United States Constitution.

By this Motion, Petitioner does not seek retribution or punishment for the acts which have caused him harm. He merely seeks protection of his rights to a proper hearing by impartial and unbiased fact-finders.

This Motion is made under the following circumstances:

A. The original Petition which Petitioner filed with this Court on July 22, 1993, sought protection from certain conduct which had been engaged in by the Nevada Commission on Judicial Discipline, and the "special prosecutor" who was hired by the Attorney General, which

was violative of Petitioner's right to due process as guaranteed by the Rules Governing the Nevada Commission on Judicial Discipline, Art 6, §21 of the Nevada Constitution, and the due process clauses of both the Nevada and United States Constitutions. The specific violations of due process, which were known to Petitioner at that time, are detailed in the petition itself.

B. On July 30, 1993, three Justices of this Court entered an Order staying the proceedings that had been undertaken with regard to Judge Whitehead. By that Order, all proceedings in the Nevada Supreme Court were to be under seal. Additionally, the members of the Commission, and any attorneys purporting to act in its behalf were, and still are, bound by the confidentiality provisions of the Rules.

C. On October 10, 1993, an article appeared in the Las Vegas Review Journal which Petitioner attached to his October 12, 1993, Motion seeking protection from the patent violation of confidentiality which is evident from its contents.

D. On October 18, 1993, the Commission, through its attorneys, filed an opposition to Petitioner's October 12, 1993, Motion. The Commission requested that the members of this court remove themselves from considering whether any member of the Commission or any attorney acting on its behalf were in contempt for violating the confidentiality requirements set forth by this Court in its order of July 30, 1993 or the Rules. The commission took the position that there could be no contempt, because this Court's Order was unlawful, and that the Commission "is not subject to the Plenary authority of this Court".

E. Stories continued to appear almost daily in the Review Journal. The content of the stories establish that 1) members of the Commission or its counsel had disseminated documents which were filed in this case under seal either directly to the press or to third parties who thereafter disseminated the documents to the press; 2) One or more members of the Commission or its counsel had leaked information, much of which was distorted, concerning the confidential underlying proceedings which were not contained in the documents which had been filed in this action; and 3) Additional information concerning actions of Judge Whitehead which were not encompassed within the Judicial Discipline's complaint for probable cause hearing was provided to the press. An example of this is set forth in the article of October 14, 1993, which appeared in the Review-Journal stating that "In a 1989 civil case, Whitehead ordered that a substantial punitive damage award by given, not to the winning party, but to the University of Nevada, Reno." See; Exhibit A.

F. On Tuesday, October 12, 1993, an article appeared in the Las Vegas Review Journal which stated that "the Nevada Press Association *plans* to file a complaint" with the Nevada Commission on Judicial Discipline against Justices Springer and Steffen. According to that article, the complaint was to be filed by Andrea Engleman, the executive director of the Nevada Press Association "as soon as the discipline commission sends her the official forms." The paper later reported that Ms. Engleman filed the complaint on October 12, 1993.

G. In response to the continued onslaught of stories in the Review-Journal concerning this case which

contained information that was either false or misleading, Petitioner filed, on about October 18, 1993, an Emergency Request for Permission to Make a Public Statement. By that Motion, Petitioner was attempting to mitigate damage being done to him by the stories that appeared in the Review-Journal which were based upon leaked information which had been embellished and loaded with inaccuracies.

H. Petitioner also filed, on about October 20, 1993, a response to the Commission's opposition to his October 18, 1993 Motion. In that response, petitioner noted that neither the Commission or its lawyers had disavowed responsibility for the leaks.

I. On October 27, 1993, the Commission, through its lawyers filed a disingenuous unsworn response to Petitioner's motion to make a public statement, in which the Commission "strongly objects to the unsubstantiated accusation by Petitioner that the press accounts of the proceedings before this Court have been leaked by Respondent or its Counsel. This accusation is made without a shred of evidence to support it and is flatly denied. Respondent must again point out that the only evidence of such "leaks" which is before the Court would indicate that Petitioner or his counsel may well be the source."

J. On November 3, 1993, this Court entered an order permitting Petitioner to make a public statement, noting "that this issue is before us due in part to serious breaches of confidentiality by "unnamed sources" in apparent violation of both the Nevada Constitution and the rules of this court. We also note that petitioner has

borne the brunt of the press accounts of the proceedings against him . . . "

K. On November 17, 1993, the Nevada Weekly in Reno printed an article in which it revealed that Ms. Engleman had been assisted in the preparation of the complaint against Justices Springer and Steffen by Evan Wallach, Esq.. (Exhibit C). Mr. Wallach is a member of the firm of Lionel, Sawyer and Collins, who represented the party against whom the punitive damages were assessed in the case referred to in the Review Journal story described above in ¶ E. *Lockwood v. Seeno Construction Co.* Case No. 85-4209, Second Judicial District Court.

Mr. Wallach is also counsel for the Review Journal. The report in the Nevada Weekly reveals that Ms. Engleman and Mr. Wallach were in haste to draft the complaint because of an approaching "deadline". The only conceivable "deadline" would be one for the newspaper to which Mr. Wallach serves as counsel.

L. On December 1, 1993, the attached article appeared in the Review Journal. (Exhibit B). That article reports on the contents of the judicial discipline complaint that allegedly has been filed against Justices Springer and Steffen : " The complaint is confidential but the Review-Journal recently learned of its contents." The article reports that Ms. Engleman would not discuss the complaint or even confirm that she filed one. If the complaint described in the article has been filed, its contents would only be known to 1) the members of the Judicial Discipline Commission; 2) its attorneys or 3) Mr. Wallach. Neither the members of this Court, or Petitioner or his counsel could have had any knowledge, prior to reading

the attached article, of the purported contents of the reported complaint. Mr. Wallach had no legitimate access to all of the prior information in this case that was leaked to the Review-Journal.[1]

M. Cynical protestations of the Commission in its October 27, 1993 reply notwithstanding, it was abundantly clear to this court on November 3, 1993, that the leaks of information to the press were calculated to, and did, damage petitioner.

N. In light of the attached article, it is incontrovertible that the source of the leaks is either a member or members of the Commission or its counsel. Ms. Engleman's complaint could only have been based upon inaccurate, leaked information which was printed in the Review-Journal. The lawyer for the Review-Journal assisted Ms. Engleman in preparing the complaint. The Review-Journal has now been provided with a copy of that complaint. The synergy between the information emanating from the Commission, the complaint against

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[1] According to the Nevada Weekly, Mr. Wallach assisted Andrea Engleman in preparing the complaint, which was signed in her official position as executive secretary of the Nevada Press Association. The Nevada Press Association had not authorized that activity. In spite of the fact the filing of the complaint had not been duly authorized by one of Mr. Wallach's clients, the NPA, it was reported by another of Mr. Wallach's clients, the Review-Journal, *prior to the filing of the complaint*, that it was to be filed on behalf of the NPA. Upon the filing of the complaint, which had been partly prepared by its counsel, the Review-Journal published suggestions that Justices Springer and Steffen were required to recuse themselves from this case by virtue of the filing of Ms. Engleman's complaint.

Justices Springer and Steffen, and the stories in the Review-Journal is apparent.

O. Pending before this Court are numerous requests by the Commission to remand this case so that the Commission can act as a fact-finder and tribunal in matters concerning Petitioner.

P. It has been demonstrated that either individual or several members of the potential fact-finding tribunal, or the counsel which will guide its inquiry, have acted maliciously in violation of the Rules in leaking confidential material, and false or misleading material, to the press.

Q. The Commission, through its counsel, has, prior to hearing any evidence concerning the merits of the allegations which its special counsel have brought against petitioner, characterized Petitioner as follows:

> 1. "This Motion is yet another example of Petitioner's arrogance and his apparent belief that he is above the constitutionally mandated process for the procedures governing judicial discipline. He has now escalated his attack on the Constitution . . . " October 18, 1993 Opposition to Motion for an Order to Show Cause.
>
> 2. "Petitioner's desire to obstruct the constitutionally mandated examination of the charges of unethical conduct brought by the citizens of Nevada . . . October 18, 1993 Motion to Dismiss.
>
> 3. "The Petitioner's purpose is clear. He wishes to rummage for any scrap of information in his on-going quest to obstruct the constitutional fact-finding function of the Nevada

Commission on Judicial Discipline." September 21, 1993 Emergency Motion.

4. "This argument is simply another of the endless series of false and baseless arguments which are proffered by Petitioner in his ceaseless effort to obscure the real issue and to deflect any scrutiny of his conduct." November 24, 1993 Opposition to Motion to Disqualify.

R. The bias of the Commission and its counsel against Petitioner is equally clear in their advancement of the absurd accusation that *the Petitioner* is the source of the numerous, illegal, and malicious leaks that have occurred in this case. See, e.g. October 27, 1993 Opposition. This accusation exposes the willingness of the Commission, or its counsel, to level accusations against Petitioner which any fair-minded person would immediately recognize as absurd: that the Petitioner was the source of the leaks which have been so horribly destructive to himself, this Court, and the public perception of judicial process.

S. Ms. Del Papa is the Attorney General under whom the investigation of petitioner has occurred, and whose employees have represented and advised the Commission in matters concerning petitioner. On November 12, 1993, Ms. Del Papa issued a Press Release, which is attached, in which she stated "What kind of message is being sent by these machiavellian efforts to go around and above the Law? You have to wonder what kind of person would resort to gross misrepresentations of fact and to smearing others to try desperately to save himself." This press release is clearly in conflict with the Rules. Exhibit D; ARJD 5.1 & 5.5.

Significantly, the Attorney General, has not once indicated publicly her disapproval of the repeated, corrupt leaks which violated Nevada law.

T. The Rules, consistent with due process and fundamental fairness, guarantee the respondent "a right to a fair hearing without prejudgment." ARJD 8. Additionally, the Rules provide that:

> Any member of the commission or sitting alternate member may be disqualified upon challenge for cause by the respondent . . . A challenge must be heard by the commission, and the commission may disqualify any commissioner who by reason of actual or implied bias would, in the opinion of a majority of the members present, either be prevented from adjudicating the matter in a fair and impartial manner or, by reason of facts creating an appearance of impropriety, be prevented from adjudicating the matter in a manner consistent with maintenance of public confidence in the commission. ARJD 3.6

U. Petitioner certainly hopes that at least some individual members of the Commission have been unaware of the source of, and motivation for, the leaks and other damaging acts which have emanated from the group as a whole (or its counsel). If so, he would have expected that individual members of the Commission would have instigated an energetic inquiry to determine the source of the misconduct which has indisputably occurred. There has been no such inquiry, which causes additional concern about petitioner's ability to receive a hearing before the Commission which is fundamentally fair. Individual

members of the commission may be unaware of the pervasive prejudice to Petitioner, and to the integrity of the Commission itself, which has been caused by the selective leaks of distorted information in violation of law. However, to the extent that the Commission's members know that there is a clear duty of confidentiality, which has been repeatedly violated to petitioner's prejudice, it appears that none of them have taken action to protect petitioner's rights.

V. Should this matter proceed before the presently-constituted fact-finder, therefore, Petitioner, absent relief from this Court, will be precluded from a meaningful exercise of his due process right to a fair hearing, before neutral fact-finders, without prejudgment. Absent relief, Petitioner will be forced to put his fate in the hands of the commission, not knowing which, and how many, of whom have surreptitiously leaked misleading information which is clearly calculated to do him harm. Whoever those individuals are ultimately determined to be, the deliberative body will consist of others who have not violated the rules themselves, but who have been reluctant to enforce them to adequately protect the Petitioner. It is indisputable that the source(s) of this information have violated their oath and the law in order harm Petitioner. It is, therefore, equally inescapable that the source(s) would be fundamentally incapable of fairly weighing the evidence against him, without prejudgment. It is clearly probable that the judgment of the remaining innocent members of the Commission has been contaminated by their exposure to patent ill-will of members who have surreptitiously violated the rules, and therefore Petitioner's rights.

Accordingly, Petitioner must seek protection of his rights to due process and fundamental fairness from this Court. Petitioner must make it clear that he is not interested in punishment, or retribution. His sole interest is obtaining a fair hearing, if that were possible in light of all of the circumstances attendant to this controversy.

He therefore requests that this court conduct, either directly or through an appropriate third party, an inquiry to determine which of the members of the Commission have acted in a manner which has caused prejudice to Petitioner, either by clandestinely violating the Rules and the Constitutional requirements of confidentiality, or by passively condoning the violations. Without such inquiry, Petitioner will be unable to exercise his right to exercise appropriate challenges for cause, and demonstrate, to the satisfaction of any remaining Commission members, that his challenge is justified.

The independent inquiry must be sufficiently probing so that the identities of members of the Commission, if any, who were not directly responsible for the violations but had knowledge of them will be ascertained. In the event that it is determined that members of the Commission were aware of the violation of its Rules by other members, and did nothing to remedy the misconduct, those members would also be subject to a challenge for cause. It would be clear that they have previously failed to protect the integrity of the process and Petitioner's rights within that structure.

In the event that the person(s) who violated the confidentiality of the commission is determined to be an attorney acting for the commission who has conducted,

or supervised, the investigation of the Petitioner, the fairness of the investigation and presentation which has been made to the Commission is fundamentally tainted, and must be reviewed.

Finally, Petitioner, this Court and the public are entitled to information which would provide a full understanding of why this matter has become so horribly politicized and destructive. Petitioner is entitled to a full understanding of what he is up against, and who among his potential tribunal has bias against Petitioner so strong that it has corrupted their conduct.

It is only then, if all of the other defects which have been previously raised in these proceedings are somehow remedied, that Petitioner can confront the accusations against him, proceed to a fair hearing, and attempt to salvage his reputation.

CONCLUSION AND STATEMENT OF THIS MOTION'S LEGAL FOUNDATION

By this Motion, the Petitioner seeks this Court's protection from the most recent manifestations of the politically motivated accusations against him. The illegal leaks which have continued to emanate from the Commission establish that one or more of its members or the lawyers who will guide them have repeatedly violated the law in clear violation of Petitioner's rights.

Petitioner, and his counsel want to impress upon this court that their motivation for this motion, and the reason for their concern, is not reprisal. The acts which have generated this Motion are legally significant, and must be fully considered. It is important to the citizens of this

State that this Court meet the challenge that has been brought against its authority and demonstrate the Court's commitment to the enforcement of its own Rules and orders.[2]

This Motion is brought to this Court at this time and under these circumstances to reiterate what these proceedings – which have become so political and bizarre – are fundamentally about. This action was originally filed in order to seek protection from this Court from violations of Petitioner's rights by a state commission and the attorney general.

Any action by a state agency which publicly stigmatizes a state employee, such as Judge Whitehead or any one else, without a hearing which conforms to due process of law deprives the injured employee of a "liberty interest" which is protected by the 14th Amendment of the United States Constitution. *See; Board of Regents v. Roth,* 408 U.S. 564 (1972) and its progeny. This is so even if the injured employee (like the terminated professor in *Roth,* and unlike Judge Whitehead), is subject to termination at will, and therefore has no "property interest" in

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[2] See; e.g. Nevada Const. Art 6 §21(5) ("the supreme court shall make appropriate rules for (a) the confidentiality of all proceedings before the commission, except a decision to censure . . . "); Nevada Const. Art. 6 § 1 ("The judicial power of this state shall be vested in a court system, comprising a Supreme Court . . . "); and *Bergman v. Kearney,* 241 F. 884 (D.Nev. 1917); *Galloway v. Trusedale,* 83 Nev. 13, 422 P.2d 237 (1967) (this Court's judicial power, in a constitutional sense, is something more than the power to make determinations; it includes both the power to decide finally and to carry its determinations into effect.)

his or her employment as the United States Supreme Court has interpreted that key phrase of the federal constitution. And when an employee such as Judge Whitehead is not terminable at will, the employee has a constitutionally-protected "property interest" which cannot be taken from him or otherwise diminished in violation of due process.

A state agency which seeks to discipline an employee must, as an imperative of the 14th Amendment, accord the employee all procedural rights which are defined in the applicable state law. *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985) (the constitutionally enforceable property interests of a state employee are "created and their dimensions are defined by existing rules and understanding that stem from an independent source such as state law."). Thus neither the Commission nor this Court may ignore Petitioner's federally protected entitlement to the enforcement of his state-based rights to disciplinary proceedings conducted without contrived interference of improper leaks.

The Attorney General has publicly characterized Judge Whitehead's challenge to the actions that she has taken against him as mere "technical quibbles". It appears from that characterization that the Attorney General's appreciation of the applicable law from which she could gain an adequate understanding of the potential ramifications of her position and conduct may be somewhat limited. The multi-faceted infringements upon

Judge Whiteheads federally protected rights to due process are grievous wrongs. Those wrongs cannot be successfully denied redress simply by ignoring them, as the Attorney General has suggested.[3]

The primary motivation for this Motion, however, is to bring to this Court's attention the more recent misconduct by unidentified members of the Commission which are obviously calculated to prejudice him in violation of the most basic element of due process: a fair and impartial adjudicator.

Those associated with the Commission responsible for the illegal leaks have manifested a bias against Judge Whitehead which is not merely implied, but is very real. "fairness of course requires an absence of actual bias." *In Re Murchison*, 349 U.S. 133, 136 (1955).

Members of the Commission who may not have been directly responsible for the leaks, but who did nothing to

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[3] In *Landmark Communications v. Virginia*, 435 U.S. 829 (1978), the United States Supreme Court recognized that state rules relating to the confidentiality of disciplinary proceedings are intended to obviate a judge's interest in being free from unfair stigma. In that case, the Court specifically noted that confidentiality avoids premature announcement of groundless claims of judicial misconduct or disability. *Accord See; Mosk v. Superior Court*, 607 P.2d 1030 (Cal. *en banc*, 1979).

Interestingly, both the high courts of the United States and of California have acknowledged that confidentiality in these proceedings "protects judges from injury which might result from publication of unexamined and unwarranted complaints by disgruntled litigants or their attorneys . . . or by political adversaries." 601 P.2d 1041.

stop them, may believe that they bear Judge Whitehead no ill will whatsoever.

However, their failure to protect him from repeated corrupt conduct justifies a concern that those members will be incapable of protecting Judge Whitehead against further violations of his rights. "Our system of law has always endeavored to prevent even the probability of unfairness." *Id* at 136. Thus circumstances surrounding Commission members' toleration of the clear misconduct which has occurred in these proceedings must be subjected to searching evaluation before they can be permitted to sit in judgment of Judge Whitehead.

Until that has been accomplished, even if the many other jurisdictional and procedural deficiencies which have been identified in these proceedings can be protected adequately, any proceedings by the Commission against Judge Whitehead would be a constitutional travesty which would manifestly offend his due process rights under the Constitutions of the State of Nevada and the United States.

Respectfully submitted this 7th day of December, 1993.

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CERTIFICATE OF SERVICE

I hereby certify that I am employed by Laura Wightman FitzSimmons and that on the 7th day of December, 1993, I mailed a true and correct copy of the foregoing Motion, and postage prepaid at Las Vegas, Nevada, addressed as follows:

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